Supreme Court, U.S.
FILED

95 • 8 28 NOV 27 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

MACDRAW, INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

Larry Klayman*
Paul J. Orfanedes
KLAYMAN & ASSOCIATES, P.C.
501 School Street, S.W., Suite 700
Washington, DC 20024
(202) 646-5160

Counsel for Petitioner MacDraw, Inc.

*Counsel of Record

88 pp

QUESTIONS PRESENTED

1. What is the scope of a District Court's discretion in ruling on a motion for jury trial pursuant to Rule 39(b) of the Federal Rules of Civil Procedure?

2. Whether Petitioner is entitled to a jury trial in light of the constitutional guarantee of the right to trial by jury and the well-established line of authority holding that motions for jury trials should be granted pursuant to Rule 39(b) of the Federal Rules of Civil Procedure absent compelling circumstances to the contrary?

LIST OF PARTIES

Pursuant to S.Ct. Rule 29.6, the following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any.

Petitioner:

1. MACDRAW, INC.

   A. Parent Corporation: S.A.M.P., S.p.A.

   B. Subsidiaries: None

Respondent:

1. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Defendants:

1. THE CIT GROUP EQUIPMENT FINANCING, INC.

   A. Parent Corporation: The CIT Group Holdings, Inc.

   B. Subsidiaries: None

2. RICHARD JOHNSTON

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CITATIONS	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RULE INVOLVED	2
STATEMENT OF THE CASE	2
A. Procedural History	2
B. Statement of Facts	6
REASONS FOR GRANTING THE WRIT	9

Page

I. THIS MATTER PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND ALSO PRESENTS A CONFLICT AMONG THE U.S. CIRCUIT COURTS OF APPEAL CONCERNING THE SCOPE OF A DISTRICT COURT'S DISCRETION IN RULING ON A MOTION FOR JURY TRIAL UNDER RULE 39(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE 9

A. A Writ of Mandamus is Appropriate to Compel a Jury Trial 10

B. A Clear Divergence of Authority Exists Among the U.S. Circuit Courts of Appeal on this Important Issue of Federal Law 11

C. MacDraw Must, Respectfully, Be Allowed to Exercise Its Fundamental Right to A Jury Trial 17

CONCLUSION 23

APPENDIX A - OCTOBER 3, 1995 APPELLATE COURT ORDER DENYING PETITION FOR WRIT OF MANDAMUS 1a

APPENDIX B - JULY 31, 1995 DISTRICT COURT ORDER DENYING RENEWED MOTION FOR JURY TRIAL 3a

APPENDIX C - JANUARY 17, 1994 DISTRICT COURT MEMORANDUM OPINION AND ORDER DENYING MOTION FOR JURY TRIAL 5a

TABLE OF CITATIONS

CASES **Page**

AMF Tuboscope, Inc. v. Cunningham,
352 F.2d 150 (10th Cir. 1965) 12

Beacon Theatres, Inc. v. Westover,
359 U.S. 500, 79 S.Ct. 948,
3 L.Ed.2d 988 (1959) 10, 13

Bereslavsky v. Caffey, 161 F.2d 499
(2d Cir. 1947), *cert. denied*,
332 U.S. 770, 68 S.Ct. 82,
92 L.Ed.355 (1947) 10

Carr v. Wal-Mart Stores, Inc.,
138 F.R.D. 80 (M.D.La. 1991) 12, 18

Cascone v. Ortho Pharmaceutical Corp.,
94 F.R.D. 333 (S.D.N.Y. 1982), *aff'd.*,
702 F.2d 389 (2d Cir. 1983) 15

Credit Bureau of Council Bluffs, Inc.
v. Credit Bureau Data Centers, Inc.,
143 F.R.D. 206 (S.D. Iowa 1992) 12, 14

Daniel International Corp. v. Fischbach &
Moore, Inc., 916 F.2d 1061
(5th Cir. 1990) 12, 17

Diary Queen v. Wood, 369 U.S. 469,
82 S.Ct. 894, 8 L.Ed.2d 44 (1962) 10, 11

Page

E.E.O.C. v. Britrail Travel International Corp., 129 F.R.D. 116 (D.N.J. 1989) 14

Federal Deposit Insurance Corp. v. Cafritz, 770 F. Supp. 28 (D.D.C. 1991) 14, 18

Federal Deposit Insurance Corp v. Palermo, 815 F.2d 1329 (10th Cir. 1987) 17

Galella v. Onasis, 487 F.2d 986 (2d Cir. 1973) 13

Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974) 11

In re Yagman, 796 F.2d 1165 (9th Cir. 1986), *reh'g denied*, 803 F.2d 1085 (1986), *cert. denied*, 108 S.Ct. 450 (1987) 22

Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983) 10, 13, 23

Liteky v. United States, ___ U.S. ___, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) 21

Littlefield v. Fort Dodge Messenger, 614 F.2d 581 (8th Cir. 1980), *cert. denied*, 445 U.S. 945 (1980) 12

Page

Malbon v. Pennsylvania Millers Mutual Insurance Co., 636 F.2d 936 (4th Cir. 1980) 13, 17, 18

Merritt v. Faulkner, 697 F.2d 761 (7th Cir. 1983), *cert. denied*, 464 U.S. 986, 104 S.Ct. 433 (1983) 12

Milltex Industries Corp. v. Jacquard Lace Co., 55 F.3d 34 (2d Cir. 1995) 3

Moody v. Pepsi-Cola Metropolitan Bottling Co., 915 F.2d 201 (6th Cir. 1990) 12

Moores v. Greenberg, 834 F.2d 1105 (1st Cir. 1987) 17

Noonan v. Cunard Steamship Co., 375 F.2d 69 (2d Cir. 1967) 10, 13, 20, 22, 23

Orlowski v. TRW, Inc., 765 F. Supp. 1277 (E.D.Mich. 1991) 14, 15

Parrott v. Wilson, 707 F.2d 1262 (11th Cir. 1983), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344 (1983) 12, 17

Page

Plummer v. General Electric Co., 93 F.R.D. 311 (E.D.Pa. 1981) 14

Richardson Greenshields Securities, Inc. v. Lau, 825 F.2d 647 (2d Cir. 1987) 3, 21

Rowlett v. Anhueser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987) 12, 14

Schoenberg v. Shapoisky Publishers, Inc., 971 F.2d 926 (2d Cir. 1992) 3, 21

Swofford v. B & W, Inc., 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965) 9, 12, 17, 22

Tavoulareas v. Piro, 93 F.R.D. 11 (D.D.C. 1981) 14

Unger v. Cunard Line, Inc., 100 F.R.D. 472 (S.D.N.Y. 1984) 19

United States v. Grinnell, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) 21

Vannoy v. Cooper, 872 F. Supp. 1485 (E.D.Va. 1995) 13, 14, 18

Wysowski v. Sitmar Cruises, 127 F.R.D. 446 (D. Conn. 1989) 19

STATUES, RULES AND REGULATIONS **Page**

28 U.S.C. § 155 20

28 U.S.C. § 455 . . . . . 20, 21

28 U.S.C. § 1332 1

28 U.S.C. § 1651 1

Fed.R.Civ.P. 38(a) 11

Fed.R.Civ.P. 38(b) 11

Fed R.Civ.P. 39(b) 2, 9, 11

Rule 21, Local Rules of the U.S. Court of Appeals for the Second Circuit 1

SECONDARY AUTHORITIES

1 *Annals of Congress* 436 (1789) 22

The Federalist No. 83 (A. Hamilton) 22

5 J. Moore, *Federal Practice,* ¶ *39.09 (2d ed. 1995)* 16, 18

J. Storey, *Commentaries on the Constitution of the United States* § 1762 (Boston 1833) 22

Page

9 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2334 (1971) 16, 17

OPINIONS BELOW

The decision of the U.S. District Court for the Southern District of New York (hereinafter "District Court") denying Petitioner's motion for a jury trial is reported. *MacDraw, Inc. v. The CIT Group Equipment Financing, Inc.*, 1994 WL 17952 (S.D.N.Y., January 17, 1994) (Appendix C, 5a - 51a). The decision of the District Court denying Petitioner's renewed motion for a jury trial is unreported. (Appendix B, 3a - 4a). The decision of the U.S. Court of Appeals (hereinafter "Appellate Court") is unreported also. (Appendix A, 1a - 2a).

STATEMENT OF JURISDICTION

Petitioner, MacDraw, Inc. (hereinafter "MacDraw"), brought this case in the District Court pursuant to that Court's diversity jurisdiction as set forth at 28 U.S.C. § 1332.

On September 8, 1995, MacDraw filed a Petition for Writ of Mandamus to the Appellate Court pursuant to 28 U.S.C. § 1651, Rule 21 of the Federal Rules of Appellate Procedure and Rule 21 of the Local Rules of the United States Court of Appeals for the Second Circuit Supplementing the Federal Rules of Appellate Procedure. On October 3, 1995, the Appellate Court denied MacDraw's Petition for Writ of Mandamus.

This Petition for Writ of Certiorari is timely if filed within ninety (90) days of October 3, 1995, or by January 1, 1996.

RULE INVOLVED

Rule 39(b) of the Federal Rules of Civil Procedure provides:

> **(b) By the Court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

STATEMENT OF THE CASE

A. Procedural History

This case was initiated on July 30, 1991, when MacDraw, a Maryland based manufacturer and importer of wire drawing equipment, filed a Complaint against CIT Group Equipment Financing, Inc. and Richard Johnston (hereinafter "CIT") in the District Court alleging fraud, promissory estoppel and other related claims. Due to the lengthy dockets in the District Court, MacDraw initially opted not to demand a jury trial so that its claims could be adjudicated at the earliest practicable date. CIT filed its Answer to MacDraw's Complaint on September 12, 1991.

Shortly thereafter, MacDraw became convinced that a jury, rather than the trial judge assigned to this case, would be potentially more receptive to its claims at trial. This concern arose as a result of a November 14, 1991 hearing -- the very first hearing held in the case -- at which the trial judge was extremely critical of MacDraw's claims before MacDraw had

even had the opportunity to present any of its proof. Specifically, the trial judge first advised MacDraw that, in her view, its claims should have been brought in a bankruptcy court rather than in the District Court. The trial judge then stated, "I just don't see the obligation on the part of CIT to protect your client." Finally, when MacDraw raised the possibility of filing a motion for summary judgment to demonstrate the bases for its claims and to narrow the issues for trial, the trial judge denounced the suggestion as "a waste of time." In light of the trial judge's demonstrated opposition to MacDraw's at this early stage of these proceedings, MacDraw filed and served a Notice of Jury Trial on December 13, 1991, approximately three (3) months after CIT filed its Answer.

A second hearing only further confirmed that a jury, rather than the trial judge, would be a potentially fairer arbiter of MacDraw's claims. For example, at a pre-motion conference held on February 21, 1992,[1] only the second hearing held in this case, the trial judge again demonstrated that she had already formed an opinion on the ultimate issue of the case, *i.e.* CIT's obligation to MacDraw, when she declared: "I think [CIT has] not assumed any other responsibility [to MacDraw], and I think that you are building supposition upon supposition that they have." When MacDraw again raised the possibility

---

[1] The Second Circuit has expressed skepticism about rules of practice, such as those employed by the trial judge, that require litigants to participate in pre-motion conferences before any motions can be filed (*see Milltex Industries Corp. v. Jacquard Lace Co.*, 55 F.3d 34, 39 & n. 10 (2d Cir. 1995); *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926, 936 (2d Cir. 1992), and, in particular, about this particular trial judge's use of such pre-motion conferences. *Richardson Greenshields Securities, Inc. v. Lau*, 825 F.2d 647, 652-63 (2d Cir. 1987).

of filing a motion for summary judgment, the trial judge threatened MacDraw with sanctions. Again, these statements had been made before the trial judge had the opportunity to fully review MacDraw's proof. Thus, MacDraw again raised the subject of having its claims tried before a jury.[2]

Shortly thereafter, on or about April 9, 1992, MacDraw filed a motion for a jury trial. In its motion, MacDraw argued that a jury trial was appropriate because: (1) its contract and fraud claims were ideally suited for a jury; (2) there was no concern about prejudice to CIT because the request had been made during the initial stages of the litigation and discovery had just begun; and (3) CIT had ample time to conduct any additional discovery it might require to prepare for a jury trial. MacDraw did not raise, however, the issue of the District Court's apparent predisposition against its claims in this motion.

The District Court failed to rule on this and other pending matters for almost twenty one (21) months -- despite several inquiries from MacDraw. Consequently, on January 4, 1994, MacDraw was forced to file a petition for writ of mandamus with the U.S. Court of Appeals for the Second Circuit (hereinafter "the Appellate Court" or "Second Circuit").

On January 17, 1994, the legal holiday commemorating Martin Luther King's Birthday and one day before the Second Circuit was to rule, the trial judge issued a Memorandum Opinion and Order, effectively mooting out MacDraw's

---

[2] In the intervening time period, the parties had addressed MacDraw's December 13, 1991 Notice of Jury Demand in correspondence to the District Court.

petition for writ of mandamus. In this January 17, 1994 Memorandum Opinion and Order, the trial judge denied MacDraw's motion for a jury trial. In doing so, the trial judge ruled that the law of the Second Circuit effectively prevented her from exercising any discretion:

> "MacDraw's argument rests upon the mistaken belief, however, that the Court has 'broad discretion to grant a jury trial,' absent any prejudice to the defendants. As this is not the standard in this circuit, and as MacDraw has not offered an acceptable explanation for its delay, the Court cannot exercise its discretion under Rule 39(b)."

See 17a-18a (Emphasis added).

On July 5, 1995, MacDraw filed a renewed motion for jury trial in the District Court, this time raising its concerns about the trial judge's apparent predisposition and asserting that a jury trial was necessary to preserve the appearance of impartiality, as well as the bases it had asserted in its initial motion.[3] In its renewed motion, MacDraw also cited several additional instances that had occurred in the intervening time period in which the trial judge had demonstrated her apparent predisposition against MacDraw's claims.

On July 31, 1995, the District Court denied MacDraw's renewed motion for a jury trial:

---

[3] CIT and Johnston previously had filed a renewed motion for summary judgment. As MacDraw did not want to antagonize the trial judge by raising the issue of her apparent predisposition against MacDraw's claims while this renewed motion was pending, it logically waited until the District Court had ruled on this motion before renewing its motion for jury trial.

> "By Memorandum Opinion and Order dated January 17, 1994, however, the Court already denied MacDraw's motion, rejecting many of the same arguments set forth in the present motion. As for MacDraw's argument that the Court is biased against its claims, the Court finds this contention to be without merit."

Consequently, on September 8, 1995, MacDraw filed a second Petition for Writ of Mandamus with the Second Circuit requesting that the District Court be ordered to allow MacDraw's claims to proceed before a jury. In this petition, MacDraw demonstrated a conflict among the U.S. Circuit Courts of Appeal in ruling on Rule 39(b) motions. MacDraw also demonstrated that the Second Circuit's very narrow interpretation of a District Court's discretion under Rule 39(b) was a minority view. MacDraw then proceeded to argue that it was entitled to a jury trial under both the majority and minority lines of authority. However, on October 3, 1995, the Appellate Court denied MacDraw's petition without opinion.[4]

B. Statement of Facts

In the underlying case, CIT agreed to finance approximately $7 million worth of wire drawing equipment that Laribee Wire Manufacturing Co., Inc. (hereinafter "Laribee") had purchased from MacDraw. In addition to supplying this machinery, MacDraw agreed to install and "up grade" the equipment at Laribee's factories in Jordan and

---

[4] On the eve of filing this Petition for Writ of Certiorari, MacDraw received notification from the District Court that this matter had been reassigned to another trial judge. MacDraw respectfully submits that this reassignment does not effect its right to a jury trial.

Camden, New York. Due to the magnitude of the transaction, delivery and installation was scheduled to take place over several months. Once MacDraw had installed the equipment, made it operational, and added specified "up grades," its value was to exceed its purchase price by approximately fifty percent (50%).

Under CIT's agreement with Laribee, referred to as the "Progress Payment Agreement," CIT was to make a series of scheduled payments directly to MacDraw as the equipment was being manufactured, delivered and installed. Pursuant to the terms of MacDraw's agreement with Laribee, MacDraw was to receive its final payment upon completion of the installation, but not later than ninety (90) days after physical delivery of the equipment to Laribee's plants. However, unbeknownst to MacDraw, CIT's agreement with Laribee allegedly required Laribee to satisfy certain financial conditions each time CIT released funds to MacDraw. Also unbeknownst to MacDraw, Laribee's financial condition had begun to deteriorate.

As MacDraw began delivery and installation of the equipment, CIT made payments to MacDraw directly. MacDraw completed delivery of the equipment in July of 1990. By September of 1990, CIT had paid MacDraw for ninety percent (90%) of the equipment, but these payments had been very late. Indeed, MacDraw had been forced to delay delivery of some of the equipment because CIT had failed to make payments in a timely manner. Importantly, CIT had communicated with MacDraw regularly during this time period, establishing a course of dealing between the two companies. Therefore, as the ninety (90) day time period for receiving the final payment of $711,862.80 approached,

MacDraw sought assurances from CIT that it would, indeed, be paid.

On one such occasion, on October 11, 1990, Mr. Massimo Colella, the Vice-President of MacDraw, advised CIT that MacDraw would cease installation of the equipment unless CIT provided assurances that final payment would be made. CIT responded by assuring MacDraw that the final payment would be made as soon as Laribee confirmed that the equipment had been fully installed and was acceptable. A confirmation letter CIT sent MacDraw on the following day stated: "...we will be able to proceed forward with the final funding once we have received confirmation from Laribee that the equipment has been installed and accepted." CIT never advised MacDraw that payment was conditioned on Laribee's financial status, or that Laribee was experiencing financial hardship. Nonetheless, in reliance on these promises, MacDraw continued installing and up-grading the equipment. Unbeknownst to MacDraw, Laribee provided confirmation to CIT that the equipment had been installed and was acceptable, but CIT failed to advise MacDraw of this fact and refused to make the final payment of $711,862.80 to MacDraw.

On February 7, 1991, Laribee filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code. CIT took possession of the equipment pursuant to a security interest it acquired as part of its financing agreement with Laribee, and then sold it to another party. MacDraw never received the final payment of $711,862.80.

REASONS FOR GRANTING THE WRIT

I. THIS MATTER PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND ALSO PRESENTS A CONFLICT AMONG THE U.S. CIRCUIT COURTS OF APPEAL CONCERNING THE SCOPE OF A DISTRICT COURT'S DISCRETION IN RULING ON A MOTION FOR JURY TRIAL UNDER RULE 39(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

This petition raises an important issue of federal law that has not been, but should be, settled by this Court -- namely, what is the scope of a District Court's discretion in ruling on a motion for jury trial under Rule 39(b) of the Federal Rules of Civil Procedure? Rule 39(b) rule provides that a District Court may exercise its discretion in determining whether to allow a jury trial when a party has not requested a trial by jury within the time period established by Rule 38(b) of the Federal Rules of Civil Procedure. Thus, the petition raises an important issue concerning the fundamental right to trial by jury as declared by the Seventh Amendment to the Constitution.

Significantly, the petition also presents a conflict among the Circuit Courts of Appeal on this important issue because at least two distinct, yet highly divergent lines of authority have emerged. The majority view, represented by the decision of the U.S. Court of Appeals for the Fifth Circuit in *Swofford v. B & W, Inc.*, 336 F.2d 406, 409 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965),

that a District Court's discretion is very broad and that Rule 39(b) motions must be granted absent compelling reasons to the contrary. By contrast, the minority view, represented by Second Circuit's decision in *Noonan v. Cunard Steamship Co.*, 375 F.2d 69, 70 (2d Cir. 1967) and the decision of the U.S. Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit") in *Lewis v. Time, Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983), holds that a District Court's discretion is quite narrow and that Rule 39(b) motions must be denied absent a showing by the moving party that its failure to request a jury trial within the time frame specified by Rule 38(b) resulted from "more than mere inadvertence."

In this case, the District Court denied Petitioner's Rule 39(b) motion for a jury trial after finding that it had no discretion, under the minority view, to allow trial by jury. Petitioner then sought a Writ of Mandamus from the Appellate Court, citing the split of authority among the U.S. Circuit Courts of Appeal and demonstrating that, despite the District Court's refusal to exercise that discretion, it was entitled to a jury trial under both lines of cases. However, the Appellate Court declined to order a jury trial.

A. A Writ of Mandamus is Appropriate to Compel a Jury Trial.

In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), this Court unambiguously held that mandamus is the proper procedural

tool to protect a litigant's constitutional right to a jury trial.[5] *See also Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76, 78 (2d Cir. 1974). Indeed, in *Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct 894, 8 L.Ed.2d 44 (1962), this Court implied that it was the duty of the U.S. Courts of Appeal to grant mandamus in aid of the right to a jury trial:

> "Our decision [in *Beacon Theatres, Inc. v. Westover*] . . . emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury..."

Dairy Queen, 369 U.S. at 472. Consequently, where appropriate, mandamus is the proper tool to compel a District Court to allow a jury trial.

B. A Clear Divergence of Authority Exists Among the U.S. Circuit Courts of Appeal on this Important Issue of Federal Law.

Rule 38(a) of the Federal Rules of Civil Procedure states: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Rule 38(b) of the Federal Rules of Civil Procedure states that any party may demand trial by jury by serving a jury demand not later than ten (10) days after the service of the last pleading.

---

[5] In *Beacon Theatres, Inc.*, the Supreme Court cited with approval the Second Circuit's decision in *Bereslavsky v. Caffey*, 161 F.2d 499, 501 (2d Cir. 1947), *cert. denied*, 332 U.S. 770, 68 S.Ct. 82, 92 L.Ed.355 (1947), in which that Court held that it had power to issue a writ of mandamus commanding a District Court to conduct a jury trial.

Rule 39(b) of the Federal Rules of Civil Procedure grants a trial judge the discretion to allow a jury trial when one has not been requested within the time frame set out in Fed.R.Civ.P. 38(b).

Despite the fundamental nature of the right to trial by jury, the liberality with which a district court's discretion is to be exercised under Rule 39(b) varies from Circuit to Circuit. A majority of the U.S. Circuit Courts of Appeal hold that, because of the constitutional basis of the right to trial by jury, a district court has very broad discretion in ruling on Rule 39(b) motions, and such motions should be granted absent compelling reasons to the contrary. *See e.g. Swofford*, 336 F.2d at 409; *Moody v. Pepsi-Cola Metropolitan Bottling Co.*, 915 F.2d 201, 207 (6th Cir. 1990); *Rowlett v. Anheuser-Busch, Inc.* 832 F.2d 194, 200 (1st Cir. 1987) ("discretion under Rule 39(b) is very broad"); *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344 (1983); *Merritt v. Faulkner*, 697 F.2d 761, 767 (7th Cir. 1983), *cert. denied*, 464 U.S. 986, 104 S.Ct. 433 (1983); *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir. 1980), *cert. denied*, 445 U.S. 945 (1980) ("jury trials ought to be liberally granted when no prejudice results"); *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965).

The rationale offered in support of a broad exercise of discretion is that the constitutional nature of the right to trial by jury limits a district court's discretion to deny a Rule 39(b) motion. *Daniel International Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1064 (5th Cir. 1990); *Swofford*, 336 F.2d at 409; *Credit Bureau of Council Bluffs, Inc. v. Credit Bureau Data Centers, Inc.*, 143 F.R.D. 206, 212 (S.D. Iowa 1992);

Carr v. Wal-Mart Stores, Inc., 138 F.R.D. 80, 80-81 (M.D.La. 1991). Indeed, the majority view is entirely consistent with this Court's admonition that:

> "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost of care."

Beacon Theatres, Inc., 359 U.S. at 501.

However, two U.S. Circuit Courts of Appeal, the Second Circuit and the Ninth Circuit, have taken a much more narrow view of a district court's discretion. Under the law of these circuits, a Rule 39(b) motion must be denied absent a showing by the moving party of "more than mere inadvertence" in not demanding a jury trial within the time frame set forth in Rule 38(b). *Noonan*, 375 F.2d at 70; *Lewis*, 710 F.2d at 556-57; *see also Galella v. Onasis*, 487 F.2d 986, 996-97 (2d Cir. 1973).

Three other Circuit Courts, the U.S. Court of Appeals for the Third Circuit (hereinafter "Third Circuit"), the U.S. Court of Appeals for the Fourth Circuit (hereinafter "Fourth Circuit"), and the U.S. Court of Appeals for the District of Columbia Circuit (hereinafter "DC Circuit") have not, apparently, addressed the issue conclusively.[6] However,

---

[6] In *Malbon v. Pennsylvania Millers Mutual Insurance Co.*, 636 F.2d 936, 940 & n. 11 (4th Cir. 1980), however, the Fourth Circuit noted that the decision to grant a motion for jury trial pursuant to Rule 39(b) of the Federal Rules of Civil Procedure is within the District Court's discretion and, in

various District Courts within those Circuits have applied the more lenient standard represented by the majority view. For example, in *Vannoy v. Cooper*, 872 F. Supp. 1485, 1486-89 (E.D.Va. 1995) the U.S. District Court for the Eastern District of Virginia considered and expressly rejected the minority view as "not persuasive" and "inconsistent with the plain language of Rule 39(b)." In *Tavoulareas v. Piro*, 93 F.R.D. 11, 14-15 (D.D.C. 1981), the U.S. District Court for the District of Columbia specifically cited the Fifth Circuit's holding in *Swofford* and granted a Rule 39(b) motion because no prejudice or delay would result by allowing a jury trial and because the issues to be resolved were "of the type appropriate for resolution by a jury." *See also Federal Deposit Insurance Corp. v. Cafritz*, 770 F. Supp. 28, 30-31 (D.D.C. 1991) (noting that the "[DC Circuit] has not adopted an overly strict approach to Rule 39(b)" and identifying several factors to aid in this determination). Finally, in *E.E.O.C. v. Britrail Travel International Corp.*, 129 F.R.D. 116, 117 (D.N.J. 1989) the U.S. District Court for the District of New Jersey expressly stated that courts should look favorably toward Rule 39(b) motions unless persuasive reasons exist to deny them. *See also Plummer v. General Electric Co.*, 93 F.R.D. 311, 313-14 (E.D.Pa. 1981) (Rule 39(b) motion granted where claims were properly susceptible to determination by jury, the orderly administration of claims would not be disturbed, and there was no persuasive showing of prejudice).

Several courts have themselves noted the split of authority among the U.S. Circuit Courts of Appeal. *See Rowlett*, 832

---

dicta, identified several factors that courts have looked to in making this determination.

F.2d at 199-200; *Vannoy*, 872 F. Supp. at 1468-89; *Credit Bureau of Council Bluffs, Inc.*, 143 F.R.D. at 211 n. 3 (noting that a split of authority exists among the Circuit Courts of Appeal on the issue of whether a district court must deny a Rule 39(b) motion if the only reason given for a late jury demand is inadvertence or oversight); *Orlowski v. TRW, Inc.*, 765 F. Supp. 1277, 1278 (E.D.Mich. 1991) (noting that "the Sixth Circuit does not follow the Ninth Circuit's rigid approach"); *Cascone v. Ortho Pharmaceutical Corp.*, 94 F.R.D. 333, 335-40 (S.D.N.Y. 1982). Indeed, in *Cascone*, the district court itself noted this divergence of authority and concluded:

> "This Court believes that the better and more timely modern rule is that established in *Swofford v. B & W, Inc . . . Swofford* appears to be the majority rule and has been followed by the Sixth, Eight, and Tenth Circuits as well as the District of Massachusetts and the Eastern District of Wisconsin."

Cascone, 94 F.R.D. at 339 (Citations omitted).[7]

Indeed, leading commentators on the Federal Rules of Civil Procedure also have noted the divergence of authority among the U.S. Circuit Courts of Appeal:

---

[7] The district court's decision in *Cascone*, which involved a case that had been removed from state court, was affirmed by the Second Circuit on appeal. *Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389 (2d Cir. 1983). However, the Second Circuit expressly stated that "[w]e do not consign *Noonan* to overruled status," and has made clear that its decision in *Cascone* is limited to certain cases that have been removed from state courts. *Cascone*, 702 F.2d at 393.

> "While it is universally acknowledged that a Rule 39(b) motion for jury trial is addressed to the trial court's discretion, the appellate courts have not always set forth clear guidelines for the district court to follow in exercising this discretion."

5 J. Moore, *Federal Practice*, ¶ 39.09 at 39-31 (2d ed. 1995).

> "There is a wide divergence of view on how a court should exercise its discretion on a motion under Rule 39(b). It is the rule in some courts that 'the court should grant a jury trial in the absence of strong and compelling reasons to the contrary.' Elsewhere it has been held that the court has no discretion to grant jury trial when there was no timely demand unless there are special circumstances excusing the oversight or default."

9 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2334 at 113 (1971) (Citations omitted).

This same commentator not only noted this divergence of authority, but has been very critical of the minority line of cases that takes a stricter view of a district court's discretion under Rule 39(b):

> "Those courts that have taken a highly restrictive view of the circumstances in which the discretion given by Rule 39(b) will be exercised in favor of allowing a jury trial have reasoned that the power to order trial by jury given them by that rule was not intended to serve as a device to circumvent or bypass the positive action that must be taken under Rule 38 to obtain jury trial.

> These decisions seem to place the emphasis in the wrong place. Technical insistence upon imposing a penalty for default by denying a jury trial is not in the spirit of the rules. The rules do not limit the court's discretion in ordering a jury in cases in which there would have been a right to jury trial. The court ought to approach each application under Rule 39(b) with an open mind and an eye to the factual situation in that particular case, rather than with a fixed policy against granting the application or even a preconceived notion that applications of this kind are usually to be denied."

9 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2334 at 115-16 (1971) (Emphasis added).

C. MacDraw Must, Respectfully, Be Allowed to Exercise Its Fundamental Right to A Jury Trial.

Under either the majority or the minority view, MacDraw is, respectfully, entitled to have its claims tried before a jury.

Those Circuit Courts of Appeal that follow the majority view under the *Swofford* line of cases often look to as many as five (5) factors in ruling on Rule 39(b) motions. These factors include the following: (1) whether the case involves issues best tried to a jury; (2) whether granting the motion would result in a disruption of the District Court's schedule or that of the adverse party; (3) the degree of prejudice to the adverse party; (4) the length of the delay in having requested a jury trial;[8] and (5) the reason for the movant's tardiness in

requesting a jury trial. *Daniel International Corp.*, 916 F.2d at 1064-65; *Parrott*, 707 F.2d at 1267; *Malbon*, 636 F.2d at 940 n. 11; *Vannoy*, 872 F. Supp. at 1486-87; *Federal Deposit Insurance Corp.*, 770 F. Supp. at 30; *Carr*, 138 F.R.D. at 81; 5 J. Moore, Federal Practice, ¶ 39.09 at 39-31. Under this analysis, it is clear that no compelling reason exists for denying MacDraw its right to a jury trial.

First, the causes of action that are to be tried include claims for fraud and promissory estoppel. Both of these claims raise factual issues -- such as the reasonableness of MacDraw's reliance and CIT's fraudulent intent -- that are traditionally and best tried before a jury.

Second, allowing a jury trial would not, respectfully, result in any meaningful or substantial disruption of the scheduling of this matter, which has already been long delayed. MacDraw first raised this issue in its December 13, 1991 Notice of Jury Trial, only approximately three (3) months after CIT filed its Answer, and more than three and a half (3 1/2) years ago. The matter then was discussed in correspondence between the parties and the District Court in January of 1992, and at the February 21, 1992 hearing. On or about April 9, 1992, MacDraw formally filed a motion for a jury trial.

---

[8] In making this determination, district courts need not look to the date that a formal motion was filed. While a separate, formal motion may be preferable, it is not required to invoke Rule 39(b); any cognizable indication of a party's intent to avail itself of a jury trial, such as an untimely demand, may be treated as a Rule 39(b) motion. *Moores v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987); *Federal Deposit Insurance Corp. v. Palermo*, 815 F.2d 1329, 1333-34 (10th Cir. 1987); *Swofford*, 336 F.2d at 408-09.

This motion then remained pending before the District Court for almost twenty one (21) months -- despite MacDraw's letters to the Court inquiring as to the status of this and other pending motions. Consequently, in comparison to the substantial delay that this case has already experienced, any additional delay that might be caused by allowing a jury trial is, respectfully, insignificant. Moreover, MacDraw -- the party that has been damaged in this matter -- is willing to accept any reasonable postponement that may prove necessary to have it claims tried before a jury.

Third, CIT will not, respectfully, be prejudiced if this matter proceeds as a jury trial. Because MacDraw served CIT with its Notice of Jury Trial only three (3) months after the filing of CIT's Answer, it has had notice for more than three and a half (3½) years that MacDraw sought to try its case before a jury. Thus, CIT has had ample opportunity to prepare its case accordingly. The disingenuous, self-serving and illusory claims of prejudice that CIT proffered to the District Court, which the District Court did not even refer to in denying MacDraw's renewed motion for jury trial, are legally insufficient to warrant denial. *See Wysowski v. Sitmar Cruises*, 127 F.R.D. 446, 449 (D. Conn. 1989); *Unger v. Cunard Line, Inc.*, 100 F.R.D. 472, 473-74 (S.D.N.Y. 1984) (mere conclusory allegations of prejudice do not warrant denial of a motion for jury trial under Fed.R.Civ.P. 39(b) in a case removed from state court). In any event, MacDraw has offered to allow CIT to conduct any discovery it might reasonably require in order to eliminate any claim of prejudice. *See Wysowski*, 127 F.R.D. at 499.

Fourth, as this matter is now in its fifth year of litigation,[9] the three (3) months that passed between the filing of CIT's answer and MacDraw's Notice of Jury trial is, respectfully, an insignificant period of time – especially when compared to the nearly twenty one (21) months of delay that this case experienced while MacDraw's motion for a jury trial and other motions were pending before the District Court.

Fifth, MacDraw did not request a jury trial at the outset of this case out of concern, ironically, that the lengthy dockets in the District Court would delay adjudication of its claims if it requested trial by jury. At that time, however, MacDraw could not foresee that the trial judge would react adversely to its claims before even having the opportunity to review any of MacDraw's proof. Thus, MacDraw was forced to file and serve its Notice of Jury Demand, and, later, its Motion for Jury Trial and Renewed Motion for Jury Trial to preserve the appearance of impartiality.

Even under the minority view, MacDraw is, respectfully, entitled to a jury trial. Surely, MacDraw's initial concern about the delay that would result from a jury demand, and the subsequent need to protect the appearance of impartiality based upon the trial judge's apparent predisposition against MacDraw's claims, constitutes "more than mere inadvertence" in the timing of its Notice of Jury Demand. *Noonan*, 375 F.2d at 69-70. While a litigant may pursue recusal or disqualification of a trial judge pursuant to 28 U.S.C. §§ 155 and 455 when an issue arises as to a district court's impartiality, case law interpreting these two statutes requires that any lack of impartiality originate from an extrajudicial

---

[9] This case was filed on July 30, 1991.

source before a litigant will be entitled to relief.[10] *Liteky v. United States*, ___ U.S. ___, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994); *U.S. v. Grinnell*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). However, this interpretation leaves a gap, which has also not been addressed previously by this Court, in the remedies available to a litigant who has not been able to demonstrate that a readily discernable judicial predisposition originates from an extrajudicial source.

In light of need to preserve the appearance of impartiality, MacDraw must, respectfully, be allowed to invoke its fundamental, constitutional right to a jury trial under Rule 39(b) of the Federal Rules of Civil Procedure to remedy this apparent predisposition, especially where, as here, no prejudice will result to CIT. Indeed, even the Second Circuit's decision in *Noonan* lends support to the notion that, in a civil context, a jury trial may protect against judicial predisposition.

---

[10] Importantly, MacDraw also had requested permission from the District Court to file a motion for recusal pursuant to the trial judge's rules of practice requiring a pre-motion conference before any motion is filed. However, despite this same trial judge having been previously admonished by the Second Circuit for effectively denying a litigant the right to file a motion by failing to schedule a timely motion conference (*Richardson Greenshields Securities*, 825 F.2d at 649-53), she effectively denied MacDraw the right to file a motion for recusal in her January 14, 1994 Memorandum Opinion and Order by threatening MacDraw and its counsel with sanctions if it requested such relief. *See also Schoenberg*, 971 F.2d at 936 ("Whenever a court directs a lawyer that he or she may not make a motion, it is in effect cutting the lines of communication between the court and the litigants. This elimination of dialog can result...in the multiplication of proceedings, especially when a party is seeking to raise a threshold issue"). In light of this stern warning from the trial judge, MacDraw was left with no alternative but to renew its request for a jury trial in order to protect its rights.

Although the Court in *Noonan* did not allow a jury trial in that *case*, it specifically found that there was "not the slightest reason to doubt" that the trial judge, as opposed to a jury, would be able to render a fair determination on the ultimate issues of the case.[11] *Noonan*, 375 F.2d at 70; *see also In re Yagman*, 796 F.2d 1165, 1188 (9th Cir. 1986), *reh'g denied*, 803 F.2d 1085 (1986), *cert. denied*, 108 S.Ct. 450 (1987) (granting relief to preserve the "fragile appearance of justice"). Unfortunately, the same cannot be said for this case.

Consequently, despite the conflict among the U.S. Circuit Courts of Appeal concerning the scope of a District Court's discretion in ruling on a motion for jury trial pursuant to Rule 39(b) of the Federal Rules of Civil Procedure, MacDraw is, respectfully, entitled to a jury trial. There are no compelling reasons for denying a jury trial. *Swofford*, 336 F.2d at 409. Indeed, there are compelling reasons for allowing this case to proceed before a jury: (1) promissory estoppel and fraud claims are best and traditionally tried to a jury; (2) no meaningful delay will result if a jury trial is allowed -- especially in light of the twenty one (21) months that passed while MacDraw's motion for jury trial was pending before the District Court; (3) no prejudice will result to CIT; (4) the three months that MacDraw waited before filing its Notice of Jury Demand is insignificant in comparison to the amount of time that has passed since this case was first filed on July 30,

---

[11] The Federalist Papers also teach of the importance of jury trials in safeguarding individual rights in civil lawsuits against an entrenched judiciary. *The Federalist No. 83*, at 500 (Alexander Hamilton) (C. Rossiter ed. 1961); *see also*, 1 *Annals of Congress* 436 (1789) (describing jury trials "one of the best securities to the rights of the people"); J. Storey, *Commentaries on the Constitution of the United States* § 1762 (Boston 1833) (describing jury trial as "essential to political and civil liberty").

1991; and (5) while MacDraw initially did not request a jury trial out of concern that the crowded dockets in the District Court would delay adjudication of its claims, it was forced to file and serve its Notice of Jury Trial in order to assure the impartiality of the trier of fact after the District Court demonstrated an apparent predisposition against MacDraw's claims. Thus, MacDraw also satisfies the much more narrow, minority view of a district court's discretion by demonstrating more than mere inadvertence in not having requested a jury trial within the time frame specified by Rule 38(b). *Noonan*, 375 F.2d at 70; *Lewis*, 710 F.2d at 556-57.

CONCLUSION

In light of the divergent lines authority regarding the scope of a district court's discretion in ruling on a Rule 39(b) motion for jury trial, and given the fundamental importance of the right to trial by jury, which is guaranteed by the Seventh Amendment to the Constitution and which has been declared by Rule 38(a) to be "inviolate," the Court must, respectfully, resolve this conflict among the Circuits on this important issue. Thus, for the foregoing compelling reasons, MacDraw respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

Larry Klayman*
Paul J. Orfanedes
KLAYMAN & ASSOCIATES, P.C.
501 School Street, S.W., Suite 700
Washington, DC 20024
(202) 646-5160

Counsel for Petitioner
*Counsel of Record

APPENDIX A - OCTOBER 3, 1995 APPELLATE COURT ORDER DENYING PETITION FOR WRIT OF MANDAMUS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

October 3, 1995, Decided
October 3, 1995, Filed

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the third day of October, one thousand nine hundred ninety-five,

PRESENT: The Hon. Ralph K. Winter, Circuit Judge
The Hon. Dennis G. Jacobs, Circuit Judge
The Hon. Pierre N. Leval, Circuit Judge

In re: MACDRAW, INC.,

Petitioner. #95-3071

A petition for writ of mandamus having been filed,

Upon consideration thereof, it is hereby ORDERED, ADJUDGED, AND DECREED that said petition be and it hereby is denied.

FOR THE COURT:
GEORGE LANGE III, Clerk
by:

/s/_____,
Beth J. Meador,
Administrative Attorney

APPENDIX B - JULY 31, 1995 DISTRICT COURT ORDER DENYING RENEWED MOTION FOR JURY TRIAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MACDRAW, INC., Plaintiff,

-against-

THE CIT GROUP EQUIPMENT FINANCING, INC. and RICHARD JOHNSTON, Defendants.

91 Civ. 5153 (SWK)

ORDER

July 31, 1995, Decided

SHIRLEY WOHL KRAM, U.S.D.J.

In this action arising out of an equipment financing dispute, plaintiff MacDraw, Inc. ("MacDraw") renews its motion, pursuant to Rule 39(b) of the Federal Rules of Civil Procedure, for an order granting it a jury trial. By Memorandum Opinion and Order dated January 17, 1994, however, the Court already denied MacDraw's motion, rejecting many of the same arguments set forth in the present motion. The Court need not revisit those findings again here. As for MacDraw's argument that the Court is biased against its claims, the Court finds this contention to be without merit.

Accordingly, MacDraw's renewed motion for a jury trial is denied.

SO ORDERED.

/s/
SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
July 31, 1995

APPENDIX C - JANUARY 17, 1995 DISTRICT COURT MEMORANDUM OPINION AND ORDER DENYING MOTION FOR JURY TRIAL

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MACDRAW, INC., Plaintiff,

-against-

THE CIT GROUP EQUIPMENT FINANCING, INC. and RICHARD JOHNSTON, Defendants.

91 Civ. 5153 (SWK)

MEMORANDUM OPINION AND ORDER

January 17, 1994, Decided
January 18, 1994, Filed

APPEARANCES:

For Plaintiff:

Klayman & Associates, P.C.
501 School St., S.W. Suite. 700
Washington, D.C., 20024
By: Larry Klayman.

For Defendants:

Winick & Rich
919 Third Avenue
New York, New York, 10022
By: Susan G. Rosenthal, Jeffrey H. Weinberger, Uri Kaufman.

SHIRLEY WOHL KRAM, U.S.D.J.

This action arises out of a financing arrangement whereby a defendant, The CIT Group/Equipment Financing, Inc. ("CIT"), agreed to fund the purchase of certain equipment by non-party corporation Laribee Wire Manufacturing Company, Inc. ("Laribee"). Plaintiff MacDraw, Inc. ("MacDraw"), the seller of the equipment, moves for: (1) permission to make a motion for voluntary recusal, pursuant to 28 U.S.C.§ 455(a); (2) a jury trial, pursuant to Local Rule 3 and Rule 39(b) of the Federal Rules of Civil Procedure; and (3) partial summary judgment, pursuant to Rule 56 (a) of the Federal Rules of Civil Procedure, on Counts Two, Three, Four and Five of the Complaint. Defendants CIT and Richard Johnston ("Johnston") (collectively, the "defendants") cross-move for an order, pursuant to Rules 56(c) and 11 of the Federal Rules of Civil Procedure (1) dismissing the Complaint; and (2) imposing sanctions.

BACKGROUND[1]

MacDraw is a Maryland corporation engaged in the sale of industrial equipment. CIT is a New York corporation that provides secured loans to finance the purchase of equipment and other capital expenditures. Johnston is a Connecticut citizen employed by CIT as a "transaction coordinator."

I. The Agreements

In July 1989, Laribee purchased approximately $ 7 million worth of industrial wire drawing equipment (the "Equipment") from MacDraw. The sale of the Equipment was embodied in a series of seven purchase orders, numbered 8695-8701, for a total price of $ 7,118,628.00 (collectively, the "Purchase Agreements"). Pursuant to the Purchase Agreements, ninety percent of the purchase money was due upon delivery of the Equipment, and the remaining ten percent was due upon acceptance and installation of the Equipment, but not later than ninety days after delivery. MacDraw contends that it also provided various accessories, spare parts and other types of upgrades (the "Enhancements") to Laribee. There is no evidence that MacDraw retained a security interest in either the Equipment or the Enhancements.

Pursuant to a Loan and Security Agreement (Progress Payment Loan) between CIT and Laribee, dated July 2, 1990 (the "Progress Payment Agreement"), CIT agreed to loan Laribee $7,250,000.00 for the express purpose of financing the Equipment. *See* the Progress Payment Agreement,

---

[1] Unless otherwise indicated, the following facts are taken from the Complaint, the parties' Rule 3(g) statements and supporting papers.

annexed to the Affidavit of Anne Beroza, sworn to on April 8, 1992 (the "Beroza Aff.") as Exh. "B."[2] As the deal was structured, CIT periodically made separate loans at various stages of the Equipment's production and delivery. Laribee maintained an ongoing obligation to repay all such interim loans, any violation of which would constitute a separate event of default, and would allow CIT to terminate financing. Prior to the payment of each interim loan, CIT conducted a formal credit evaluation of Laribee, to make certain that Laribee had complied with all of the fiscal covenants and conditions set forth in the Progress Payment Agreement. As part of this due diligence process, Laribee was required to execute a statement certifying that it was not in default of any of its loan obligations.

In connection with the Progress Payment Agreement, MacDraw and Laribee executed a "Vendor's Consent and Agreement," dated June 29, 1990 (the "Vendor's Consent Agreement"), whereby CIT was permitted to disburse funds directly to MacDraw rather than to Laribee, and Macdraw consented to an assignment of Laribee's rights to CIT. *See* Vendor's Consent Agreement, annexed to the Beroza Aff. as Exh. "C." The Vendor's Consent Agreement also provided, however, that CIT would assume none of Laribee's obligations under the sales agreement:

> We [Laribee] shall in all events remain obligated to you [MacDraw] under the Purchase Agreement, and

---

[2] MacDraw contends that CIT also agreed to pay for the Enhancements. CIT claims, however, that it neither requested nor agreed to pay for the Enhancements. *See* Beroza Aff. at P 45.

> CIT assumes no obligations thereunder, it being a successor to our rights but not our obligations.

See Vender's Consent Agreement at P 3.

II. Laribee's Default

In addition to its ongoing obligation to repay all interim loans disbursed under the Progress Payment Agreement, Laribee represented and warranted that it would keep current on all of its outstanding debts and contracts, including its revolving line of credit with the Bankers Trust Company (the "Bankers Trust Debt"). Specifically, in section 4.5 of the Progress Payment Agreement, Laribee warranted that it:

> is not in default . . . under any mortgage, indenture, contract, agreement, judgment or other undertaking to which [it] is a party or which purports to be binding upon [it] or upon any of its assets.

See Progress Payment Agreement at § 4.5. The Progress Payment Agreement provided further that an event of default would occur if the foregoing representations "proved to be untrue or misleading in any material respect." *See* Progress Payment Agreement at § 7(b). Laribee's representations and warranties were thus a condition precedent to any release of funds by CIT.[3]

---

[3] Specifically, Section 3.2 of the Progress Payment Agreement provided:

> CIT shall not be required to make any Loan hereunder . . . unless on the Closing Date of such Loan . . . (i) the representations and warranties contained in this Agreement shall be true and correct in all respects on and as of the date of the making of such Loan with

By July 30, 1990, MacDraw had delivered all of the Equipment specified in the Purchase Agreement.[4] Thereafter, as Laribee had satisfied all of the Progress Payment Agreement's credit requirements for releasing the first ninety percent worth of payments, CIT made direct payments to MacDraw in the sum of $6,406,765.25, representing ninety percent of the Equipment's price. While performing its due diligence investigation in anticipation of releasing the final ten percent payment of $ 711,862.80 (the "Ten Percent Installment"), however, CIT learned that Laribee was in default of the Progress Payment Agreement. Specifically, CIT learned that Laribee had: (1) violated two separate covenants under the Bankers Trust Debt for which Bankers Trust had declared it in default (the "Bankers Trust Covenants"); and (2) failed to make regular debt-service payments to CIT under the Progress Payment Agreement, in the amount of $ 335,656.67.

On December 12, 1990, Laribee advised CIT that, in view of these two defaults, it did not meet the Progress Payment Agreement's criteria for release of the Ten Percent Installment. Accordingly, CIT's promise to provide financing expired. Thereafter, Laribee cured its payment defaults, and the parties agreed that all of Laribee's then outstanding debt to CIT would be consolidated into a single note, the closing of which

---

the same effect as if made on and of such date; (ii) no Default or Event of Default shall be in existence on the date of the making of such Loan or shall occur as a result of such Loan.

[4] MacDraw contends, however, that it retained possession, control and title to the Equipment until on or about December 20, 1990, when the Equipment was fully installed and factory-operational. *See* Plaintiff's Statement of Disputed Facts Which Controvert Defendants' Statement Made Pursuant to Local Civil Rule 3(g) ("Plaintiff's 3(g) Response"), at 8.

would occur on December 15, 1990. CIT thus released no further funds.

III. Oral and Written Communications

Plaintiff contends that CIT agreed to pay the Ten Percent Installment pursuant to several oral and written communications between MacDraw and CIT that were separate from the Progress Payment Agreement. One such oral communication allegedly took place on October 11, 1990, between Massimo Colella ("Colella"), an employee of MacDraw, and Johnston. The substance of this conversation is hotly disputed. MacDraw claims that Johnston, on behalf of CIT, guaranteed and promised payment of the Ten Percent Installment upon MacDraw's installation of the Equipment, notwithstanding any other conditions set forth in the Progress Payment Agreement (the "October 11th Promise"). The defendants contend, however, that, upon being asked when CIT would actually disburse the final payment, Johnston simply advised Colella that the Progress Payment Agreement prescribed certain conditions of disbursement, and that many of these conditions were solely within Laribee's control. *See* Affidavit of Richard Johnston, sworn to on April 1, 1992 (the "Johnston Aff."), at P 12. Johnston contends further that he never "guaranteed" or "promised" payment. Id. at P 13.

The following day, on October 12, 1990, Johnston sent a telefacsimile to MacDraw indicating that CIT "will be able to proceed forward with the final funding once we have received confirmation from Laribee that the equipment has been installed and accepted." *See* telefacsimile from Johnston to Colella of October 12, 1990, annexed to the affidavit of Massimo Colella, sworn to on February 26, 1992 (the "Colella

Aff.") as Exh. "5." Plaintiff contends that the October 11th Promise and follow-up telefacsimile evidenced CIT's agreement to release the Ten Percent Installment once it received confirmation from Laribee that the Equipment had been installed, and thereby induced MacDraw to continue installing and fine-tuning the Equipment.

Subsequently, on November 16, 1990, CIT received a letter from Laribee in which Laribee indicated that the MacDraw "machines are accepted by us as operational and in good condition." The letter indicated further that "this will serve as your authorization to wire transfer the final 10% balance owed to MacDraw, [sic] Inc. on the machinery purchased pursuant to our loan agreement." *See* letter from Manuel L. Ramos, executive vice president of Laribee to Johnston of November 16, 1990, annexed to the Colella Aff. as Exh. "9." Nevertheless, on November 28, 1990, Johnston advised Colella that the Ten Percent Installment could not be processed as Laribee had not yet complied with the Progress Payment Agreement's conditions precedent for the release of the funds. Johnston indicated further that "at this point he does not know if [Laribee] will, and if [it] will, when [it] will comply." *See* telefacsimile from Colella to Larry Muschlitz, vice president of Laribee, memorializing a telephone conversation between Colella and Johnston, of November 28, 1990, annexed to the Beroza Aff. as Exh. "K."

On November 30, 1990, before CIT completed its due diligence investigation, Johnston telefaxed to Colella a standard form letter (the "Form Letter") on which Laribee was to indicate where to direct the proceeds when ready. *See* telefacsimile annexed to the Colella Aff. as Exh. "7." On the Form Letter, Johnston marked in the scheduled amount of the

Ten Percent Installment, together with MacDraw's depository bank and account number. Additionally, on the transmittal sheet accompanying the Form Letter, Johnston requested that Colella "verify [the Form Letter's] accuracy." Id. Colella claims that this routine verification constituted a promise by CIT that payment of the Ten Percent Installment was imminent. The defendants contend, however, that the request for verification was nothing more than routine advance preparation, subject to Laribee's performance.

Subsequently, on December 14, 1990, Johnston spoke with Colella by telephone and allegedly promised him that MacDraw would receive the Ten Percent Installment by December 18, 1990. Following Laribee's defaults under the Progress Payment Agreement, however, on December 17, 1990, Johnston drafted an internal memorandum to explain to CIT's Servicing Department why CIT had only loaned Laribee ninety percent of the Equipment loan value. *See* Memorandum, annexed to the Colella Aff. as Exh. "6." In the course of making that explanation, Johnston wrote that "the unfunded 10% portion represents the amount to be paid the vendor upon satisfactory installation of the Equipment." Id.

IV. Laribee's Bankruptcy

On or about January 15, 1991, MacDraw received information that Laribee planned to file for bankruptcy protection. Subsequently, on January 22, 1991, CIT, by Johnston, informed MacDraw that it would not pay the Ten

Percent Installment.[5] On February 7, 1991, Laribee filed for protection under Chapter 11 of the Bankruptcy Code. By letter dated February 25, 1991, CIT informed MacDraw that it would be pursuing its interests as a secured creditor in the Laribee bankruptcy proceeding. Thereafter, on March 13, 1991, MacDraw filed the first of three proofs of claim in the Laribee bankruptcy proceeding. In September 1991, CIT sold the Equipment and Enhancements to Omega Wire, Inc. ("Omega").

V. The Instant Litigation

MacDraw commenced this action in July 1991, alleging breach of contract and fraud with respect to the defendants' assurances and failure to pay the Ten Percent Installment and the cost of the Enhancements. Specifically, MacDraw alleges (1) common law fraud (First Cause of Action); (2) relief as a third party beneficiary (Second Cause of Action); (3) promissory estoppel and quasi-contract (Third Cause of Action); (4) unilateral contract (Fourth Cause of Action); and (5) contract "implied in fact" (Fifth Cause of Action). A significant part of MacDraw's claims consist of the allegation that the CIT Group had "inside" information about Laribee's financial condition and induced MacDraw to complete its installation knowing and intending that Laribee eventually would file a bankruptcy petition. MacDraw also alleges that it relied on CIT's assurances of payment in completing the installation of the Equipment.

---

[5] According to MacDraw, CIT did not give any indication that the Progress Payment Agreement had been terminated, or that CIT was contemplating termination, until after Laribee filed for bankruptcy. *See* Plaintiff's 3(g) Response at 13.

MacDraw now moves (1) for permission to make a motion seeking voluntary recusal pursuant to 28 U.S.C. § 455(a); (2) for a jury trial pursuant to Local Rule 3 and Rule 39(b) of the Federal Rules of Civil Procedure; and (3) for partial summary judgment, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, on Counts Two, Three, Four and Five of the Complaint. Defendants cross-move for an order, pursuant to Rules 56(c) and 11 of the Federal Rules of Civil Procedure (1) dismissing the complaint; and (2) imposing sanctions. For the reasons set forth below, both plaintiff's and defendants' motions are granted in part and denied in part.

DISCUSSION[6]

I. DEMAND FOR A JURY TRIAL

A. Background

On July 30, 1991, MacDraw commenced this action by filing the Complaint. Thereafter, on September 12, 1991, defendants answered. Three months later, on December 13, 1991, MacDraw served a "Notice of Jury Trial" on defendants. By letters dated January 8, 1992 and January 28, 1992, defendants requested that the Court strike MacDraw's jury demand on the ground that it was untimely, pursuant to Rule 38(d) of the Federal Rules of Civil Procedure. MacDraw

---

[6] For purposes of this Discussion, the relevant submissions shall be referred to as follows: (1) Memorandum of Points and Authorities in Support of Plaintiff, MacDraw Inc.'s, Motion for Partial Summary Judgment ("Pls. Mem."); (2) Plaintiff's Memorandum of Law in Reply to Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment and in Opposition to Defendants' Cross-Motion for Summary Judgment and Sanctions ("Pls. Reply Mem.").

now seeks reinstatement of its "Notice of Jury Trial," pursuant to Rule 39 of the Federal Rules of Civil Procedure, contending that the demand was not untimely as the defendants had not taken any discovery when the demand was filed.

B. Discussion

Rule 38(b) of the Federal Rules of Civil Procedure provides that:

> Any party may demand a trial by jury . . . by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue.

Fed. R. Civ. P. 38(b) (emphasis added). Rule 38(d) provides further that failure to serve the demand as required, within ten days after service of the last pleading, "constitutes a waiver by the party of trial by jury." Fed. R. Civ. P. 38(d). In the case at hand, as noted above, the last pleading was the answer, filed on September 12, 1991. Thus, to be timely under Rule 38(b), MacDraw's jury demand should have been filed on or about September 22, 1991. As MacDraw's demand for a jury trial was in fact filed nearly three months later, on December 13, 1991, it was not timely as required by Rule 38(b), and would typically constitute a waiver.

Rule 39(b) provides, however, in pertinent part, that "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues." The Second Circuit has interpreted

Rule 39(b) quite strictly, however, in cases originating in federal court;[7] something beyond the "mere inadvertence" of counsel is required to relieve the party from its waiver. *Noonan v. Cunard S.S. Co.*, 375 F.2d 69, 70 (2d Cir. 1967); *see also Alvarado v. Santana-Lopez*, 101 F.R.D. 367, 368 (S.D.N.Y. 1984); *Printers II, Inc. v. Professionals Publishing, Inc.*, 596 F. Supp. 1051, 1052 (S.D.N.Y. 1984). As the case at hand originated in federal court, the rigid rule discussed in *Noonan* must be applied. *Printers II, Inc. v. Professionals Publishing, Inc.*, 596 F. Supp. at 1052. Thus, MacDraw must show something more than mere inadvertence of counsel to obtain relief from its waiver.

In support of its demand for a jury trial, MacDraw argues that: (1) contract and fraud claims are highly fact-specific and, thus, ideally suited for a jury; (2) there is no concern of prejudice to the defendants because the request was made before discovery began and while the litigation was in its initial stages; and (3) as discovery is still open, defendants may conduct additional discovery, if necessary. *See* Memorandum of Points and Authorities in Support of Plaintiff's Motion to Grant a Jury Trial, at 3. MacDraw's argument rests upon the mistaken belief, however, that the Court has "broad discretion to grant a jury trial," id. at 4, absent any prejudice to the defendants. As this is not the standard in this Circuit, and as MacDraw has not offered an acceptable explanation for its delay, the Court cannot exercise its discretion under Rule 39(b). *See Printers II, Inc. v. Professionals Publishing, Inc.*,

---

[7] District courts have greater discretion in applying Rule 39(b) where the action was removed from state court, *see Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389, 391-92 (2d Cir. 1983), although that is not the case here.

596 F. Supp. at 1053 (where the action originates in federal court and the party seeking a delayed jury demand alleges nothing more than mere inadvertence, a two month delay in requesting a jury trial constitutes a waiver). Accordingly, MacDraw's motion to re-instate its demand for a jury trial is denied, and this case shall proceed as a bench trial.

II. MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, MacDraw moves for partial summary judgment under Counts Two, Three, Four and Five of the Complaint. Defendants oppose plaintiff's motion and cross-move for (1) summary judgment dismissing the Complaint in its entirety and (2) sanctions pursuant to Federal Rule of Civil Procedure 11.

A. Standard of Law

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). The movant may discharge this burden by demonstrating to the Court that there is an absence of evidence to support the non-moving party's case on which that party would have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The nonmoving party then has the burden of

coming forward with "specific facts showing that there is a genuine issue for trial," Fed. R. Civ. P. 56(e), by "a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. at 322.

The court "must resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion." *Eastway Constr. Corp. v. City of N.Y.*, 762 F.2d 243, 249 (2d Cir. 1985); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1187 (2d Cir. 1987); *see also Adickes v. S.H. Kress and Co.*, 398 U.S. at 158-59. But the court must inquire whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), and grant summary judgment where the non-movant's evidence is merely colorable, conclusory, speculative or not significantly probative. Id. at 249-50; *see Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 12-15 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 45 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987). The non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

To determine whether the moving party has met its burden, the Court must focus on both the materiality and the genuineness of the factual issues raised by the nonmovant. As to the materiality, "it is the substantive law's identification of which facts are critical and which facts are irrelevant that

governs." *Anderson v. Liberty Lobby Inc.*, 477 U.S. at 248. A dispute over irrelevant or unnecessary facts will not preclude summary judgment, id., but the presence of unresolved factual issues that are material to the outcome of the litigation mandates a denial of summary judgment. *See*, e.g., Knight v. United States Fire Ins. Co., 804 F.2d at 11-12.

Once the nonmoving party has successfully met the burden of establishing the existence of a genuine dispute as to an issue of material fact, summary judgment must be denied unless the moving party comes forward with additional evidence sufficient to establish his or her burden under Rule 56. *See Celotex Corp. v. Catrett*, 477 U.S. at 330 & n.2 (Brennan, J., dissenting). In sum, if the court determines that "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587 (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289,20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)); *see also Weg v. Macchiarola*, 654 F. Supp. 1189, 1191-92 (S.D.N.Y. 1987).

B. The Fraud Claim (First Cause of Action)

In Count One, MacDraw alleges that CIT made material misrepresentations that, upon installation of the Equipment, it would pay the final Ten Percent Installment. Complaint at P 38. In reliance upon this misrepresentation, MacDraw allegedly completed installation and fine-tuning of the Equipment, thereby increasing its value. Id. MacDraw further contends that CIT was aware of Laribee's deteriorating financial condition prior to Laribee's filing for bankruptcy, and that CIT induced MacDraw to complete installation of the

Equipment in order to increase the value of CIT's security interest. Id. at P 42. On the basis of these allegations, MacDraw seeks damages of $711,000.00 (plus $ 273,940.00 in Enhancements), and also punitive damages "in excess of $1,000,000.00" and attorneys' fees.

To establish fraud under New York law, MacDraw must prove "(1) a material, false representation; (2) an intent to defraud thereby; (3) reasonable reliance on the representation; and (4) damage to the plaintiff." *Roso v. Saxon Energy Corp.*, 758 F. Supp. 164, 168 (S.D.N.Y. 1991) (quoting *Wanamaker v. Columbian Rope Co.*, 740 F. Supp. 127, 141 (N.D.N.Y. 1990)); *see also Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970-71 (2d Cir. 1987) (citing *Van Alen v. Dominick & Dominick, Inc.*, 441 F. Supp. 389, 403 (S.D.N.Y. 1976), aff'd, 560 F.2d 547 (2d Cir. 1977)). Each of these elements must be established by "clear and convincing" evidence. *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d at 971.

1. The Claim Against CIT

CIT contends that it is entitled to summary judgment dismissing the fraud claim because MacDraw has adduced no evidence demonstrating any reliance by MacDraw on CIT's alleged misrepresentation nor any intent by CIT to defraud. The Court agrees, and that a genuine issue of material fact exists as to whether (1) MacDraw relied upon CIT's alleged promise in completing installation of the Equipment; and (2) CIT intended to induce MacDraw to complete installation.

a. Reliance

Reliance, which is a "crucial element" of any fraud claim, *see Carte Blanche PTE., Ltd. v. Diners Club Int'l Inc.*, 758 F. Supp. 908, 916 (S.D.N.Y. 1991), must be justifiable under the circumstances. *Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1016 (2d Cir. 1989). As a matter of law, fraud premised upon misrepresentations that occur after plaintiff allegedly detrimentally relied cannot establish "justifiable" reliance. *See Morin v. Trupin*, 711 F. Supp. 97, 104 (S.D.N.Y. 1989) (dismissing fraud claim where defendant's alleged misrepresentation occurred in October 1987, and the only injury was money paid in 1986). Furthermore, where both parties have the means of ascertaining the falsity of the representations, New York courts have held that the complaining party should have discovered the facts, and that any reliance under such circumstances would also be unjustified. *Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d at 1016.

In the case at hand, MacDraw alleges that "but for" CIT's alleged promise of payment, MacDraw "would not have continued to deliver and install the Equipment and the Enhancements and would have taken action to repossess them while MACDRAW's workers were on the Laribee premises." *See* Colella Aff. at P 25; Pls. Reply Mem. at 33 (but for CIT's misrepresentations, MacDraw would not have "released possession of the equipment and the Enhancements and would not have completed the technical work on the equipment and the Enhancements to make them factory-ready and operational."). Thus, in substance, MacDraw contends that it relied upon CIT's alleged promise of payment in (1) completing delivery; (2) performing the installations, and (3)

making the Enhancements. Alternatively, MacDraw claims it would have "repossessed" the Equipment, and that its forbearance from doing so constitutes reliance.

i. Reliance to Complete Delivery

As CIT indicates, the Equipment was delivered to Laribee by MacDraw on July 30, 1990, more than two months prior to CIT's alleged October 11th Promise. As both the Complaint and Colella's Affidavit indicate, all of the Equipment was shipped "by July 30, 1990." Complaint at P 16 ("as of [July 30, 1990], shipment and delivery of the equipment was complete."); Colella Aff. at P 8. Therefore, as delivery was already complete by July 30, 1990, MacDraw could not possibly have relied upon CIT's supposed representations in October as inducement to complete delivery. Accordingly, MacDraw has not established justifiable reliance for purposes of common law fraud with respect to the delivery of the Equipment.

ii. Reliance to Make the Enhancements

MacDraw also claims that it "expended an additional $ 273,940.12 on specialized labor and spare parts" with respect to the Enhancements. Complaint at P 60. Although MacDraw contends that CIT wanted the Enhancements installed to increase the value of its security interest, Complaint at P 43, any purported reliance upon the October 11th Promise in making the Enhancements is without merit.

First, according to MacDraw's own invoices, much of the labor was completed and accessory parts were actually shipped to Laribee prior to CIT's alleged October 11th

Promise. *See* Invoices, annexed to the Beroza Aff. as Exh. "J." These invoices also indicate that MacDraw billed Laribee directly for the corresponding parts and labor. Thus, with respect to any Enhancement work completed before October 11, 1990, MacDraw could not have relied upon CIT's alleged misrepresentation which occurred thereafter.

Second, in a November 28, 1990 telefacsimile from MacDraw to Laribee, MacDraw confirmed that CIT had by that time disclosed that it would not release any money until Laribee had complied with certain conditions precedent. In memorializing that conversation, Colella indicated that:

> I talked to Richard Johnston this morning. He advised me that CIT will not release any more fundings until [Laribee] fully complies with their requests. Mr. Johnston told me that [Laribee] has had a long time to comply with their requests and at this point he does not know if [Laribee] will, and if [Laribee] will, when [it] will comply.

See telefacsimile from Colella to Muschlitz, of November 28, 1990, annexed to the Beroza Aff. as Exh. "K." Thus, by November 28, 1990, MacDraw knew that CIT no longer considered installment of the Equipment sufficient to trigger the final Ten Percent Installment. Rather, MacDraw had learned that CIT would not be releasing further funds absent Laribee's compliance. Accordingly, after November 28, 1990, any further fine-tuning of the Equipment by MacDraw, in reliance upon CIT's alleged October 11th Promise, was not justifiable.

Third, and most importantly, MacDraw is not justified in relying on any alleged misrepresentation made by CIT with respect to the Enhancements because the evidence clearly indicates that CIT neither requested nor agreed to pay for the Enhancements in the first place. For example, Colella testified:

> Q. Did Mr. Johnston ever say to you CIT was going to pay for any invoices in addition to those which had originally been the subject of the transaction, that being the original [Purchase Agreements]? . . .
>
> A. No. . . .
>
> Q. When you say in the first sentence of Paragraph 10, [of Colella's Moving Affidavit], "On October 11th I called Mr. Johnston and told him that MacDraw would stop work on the equipment," what work were you referring to?
>
> A. It was work aside from the initial scope of supply to help Laribee again resolve internal problems with the equipment.
>
> Q. And the cost of this work was not subject to the CIT financing; is that correct?
>
> A. That is correct. . . .
>
> Q. Did Mr. Johnston actually tell you that CIT wanted you to continue the "enhancement work"?

> A. No. . . . These particular pay offs are not in here. They are not part of the two hundred some-odd thousand dollars. They were paid, or at least supposed to be paid by another financial company that was dealing with Waller at a lower level.

Colella Deposition Transcript, dated February 12, 1992 (the "Collela Dep. Tr."), annexed to the Beroza Aff. as Exh. "H," at 116-117, 119. Where plaintiff's own testimony indicates that it never had any expectation of being paid for its services, summary judgment on the issue of reliance is appropriate. *See Aries Ventures Ltd. v. AXA Fin. S.A.*, 729 F. Supp. 289, 299 (S.D.N.Y. 1990) (granting summary judgment where plaintiff testified that he never expected to be paid). Accordingly, as MacDraw never anticipated that CIT would pay it for making the Enhancements, it could not have justifiably relied upon CIT's alleged representation concerning release of the Ten Percent Installment in completing the Enhancements.

iii. Reliance to Complete Installation

With respect to installation of the Equipment, the Court finds that there is a genuine issue of material fact as to whether (1) installation occurred between October 11, 1990 and November 28, 1990; and (2) if so, whether MacDraw relied upon CIT's alleged October 11th Promise to install the Equipment. At his deposition, Colella was asked:

> Q. On October 11, 1991, what additional work did MacDraw have to do to complete the equipment installation?

A. What is that date?

Q. October 11, 1991.

A. I believe at that time the equipment was installed.

Q. If you could look at Paragraph 10 of the affidavit, I believe there is a typographical error regarding the year of the conversation. It says October 11, 1991. Is it correct that it should be 1990?

A. That is correct.

Colella Dep. Tr. at 116-17 (emphasis added). Although this testimony might be construed as evidence that installation was completed before CIT's alleged October 11th Promise and that, therefore, MacDraw could not have justifiably relied on CIT's representation, the testimony is inconclusive. Although the operative events, including the October 11th Promise, occurred in 1990, Colella was asked whether installation was complete by 1991. As a result, the Court cannot determine, as a matter of law, whether the Equipment was completely installed by October 11, 1990 -- before the October 11th Promise -- and therefore, whether MacDraw may have relied upon CIT's alleged misrepresentation in completing installation. Accordingly, with respect to this limited issue, the motion and cross-motion for summary judgment are denied.[8]

---

[8] As reliance is also an element of a claim for promissory estoppel (Third Cause of Action), *see Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 264 (2d Cir. 1984), *cert. denied*, 469 U.S. 828 (1984), MacDraw and CIT's motion and cross-motion for summary judgment with respect to the cause of

b. Intent

To prove intent to defraud, MacDraw must demonstrate that CIT promised to disburse the Ten Percent Installment with no contemporaneous intention of releasing that payment and with the specific intent to induce reliance. *Cramer v. Devon Group, Inc.*, 774 F. Supp. 176, 181 (S.D.N.Y. 1991); *Margate Indus., Inc. v. Samincorp. Inc.*, 582 F. Supp. 611, 619 (S.D.N.Y. 1984); *Rosenthal v. Kingsley*, 674 F. Supp. 1113, 1126 (S.D.N.Y. 1987). The burden of proving specific intent not to perform an alleged promise cannot be satisfied merely upon a showing of nonperformance by the promisor. *Margate Indus., Inc. v. Samincorp. Inc.*, 582 F. Supp. at 619; *Di Rose v. PK Management Corp.*, 691 F.2d 628, 633 (2d Cir. 1982), *cert. denied*, 461 U.S. 915 (1983). However, the issue of intent is generally a question of fact reserved for the jury. *Cramer v. Devon Group, Inc.*, 774 F. Supp. at 182 ("where intent or state of mind is at issue, 'summary judgment should be used sparingly,'") (quoting *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985)).

In the instant matter, MacDraw alleges that "CIT knew that failure to promise payment of the [Ten Percent Installment) would jeopardize delivery of possession of the Equipment and thus deprive [it] of additional collateral" and "wanted the Enhancements installed to increase the value of their security interest." Pls. Reply Mem. at 24. As discussed previously, however, as delivery of the Equipment occurred

---

action sounding in promissory estoppel are also denied on the grounds that a genuine issue of material fact exists regarding whether MacDraw relied upon CIT's October 11th Promise in completing installation between October 11, 1990 and November 28, 1990.

on July 30, 1990, two months before Johnston's alleged misrepresentation on October 11, 1990, CIT could not have intended to secure delivery of the Equipment by promising the Ten Percent Installment. Similarly, as CIT neither requested nor agreed to pay for the Enhancements, there is no evidence that CIT's alleged misrepresentation with respect to the final payment was intended to induce MacDraw to install the Enhancements either. With respect to the installation of the Equipment, however, MacDraw has provided a CIT credit report, indicating that, by September 30, 1990, CIT was aware of Laribee's financial losses. *See* Credit Report, annexed to the Colleia Aff. as Exh. "4." Although this is scant evidence of CIT's fraudulent intent, the Court finds that the credit report does raise a genuine issue of material fact as to whether CIT knew, by the time it allegedly made the October 11th Promise, that Laribee would be bankrupt before the final payment could be made. Accordingly, with respect to the limited issue of whether CIT intended to fraudulently induce MacDraw to complete installation of the Equipment, the Court finds a genuine issue of material fact.

2. The Claim Against Richard Johnston

MacDraw's first cause of action, sounding in common law fraud, is pleaded not only against CIT, but also against Johnston, a clerical employee at CIT whose responsibilities with respect to the transaction at issue were essentially those of a "paralegal." *See* Johnston Aff. at PP 3-6. Specifically, MacDraw contends that Johnston, "individually and on behalf of CIT," made various "material misrepresentations" assuring MacDraw that CIT would "fulfill its obligation and pay the final ten (10) percent installment." Complaint at P 39. MacDraw further alleges that Johnston did not act in good

MacDraw further alleges that Johnston did not act in good faith and, in fact, knew that CIT did not intend to make payment, but rather, intended to induce MacDraw to complete the installation to increase the Equipment's value. Id. at PP 39-43. Citing cases involving breach of contract, CIT contends that the claim against Johnston must be dismissed as Johnston was (1) not an officer of CIT; (2) acting within the scope of his employment; and (3) not acting for personal profit or gain. Although CIT's argument with respect to claims for breach of contract is correct, MacDraw has alleged that Johnston committed a tort. As a matter of law, it is undisputed that an individual who commits a tort while acting in his capacity as a corporate officer or employee may be held personally liable. *General Elec. Capital Corp. v. Adams Communication Corp.*, 91 Civ. 2729, 1991 WL 190594, at * 7 n.7 (S.D.N.Y. Sept. 18, 1991); *see also Model Imperial Supply, Co. v. Westwind Cosmetics, Inc.*, 808 F. Supp. 943, 946 (E.D.N.Y. 1992). This is true even if the employee or officer was acting on behalf of the corporation and in the course of his official duties. *West Indian Sea Island Cotton Ass'n v. Threadtex, Inc.*, 761 F. Supp. 1041, 1054 (S.D.N.Y. 1991).

In the instant case, plaintiff alleges that Johnston's misrepresentation caused or induced MacDraw to continue installation of the Equipment. Under these circumstances, the Court finds that the Complaint states a cause of action against Johnston. As a genuine issue of material fact still remains, however, with respect to Johnston's intent and MacDraw's reliance upon Johnston's alleged misrepresentations, the cross-motions for summary judgment are denied.

C. The Third Party Beneficiary Claim (Second Cause of Action)

In its second claim for relief, MacDraw seeks damages as an "intended third party beneficiary of [the] agreement between CIT and Laribee." Complaint at P 45. "Based upon this agreement, CIT, as the promisor, became primarily liable to MacDraw for payment on the equipment purchase orders." Id. In support of its motion for partial summary judgment with respect to this claim, MacDraw relies upon the following language in the Progress Payment Agreement:

> During the Interim Loan Period, interim loans ("Interim Loans") shall be made for progress payments from time to time in amounts equal to the payments due to [MacDraw] under the terms of the Purchase Agreement as follows . . . (iii) 10% of the Commitment [Ten Percent Installment] upon satisfactory confirmation that [Laribee] has given its final acceptance of all Equipment.

See Progress Payment Agreement at § 2.1(b). MacDraw contends that this language indicates that the parties intended that payments would be made to MacDraw, and that the Ten Percent Installment was contingent upon "final acceptance," i.e., installation of the Equipment.

Under New York law, only the intended beneficiary of a contract may assert third party rights thereunder. *Inn Chu Trading Co. v. Sara Lee Corp.*, 810 F. Supp. 501, 504-05 n. 6 (S.D.N.Y. 1992). Although the parties' "intent to benefit a third party must be shown on the face of the agreement," *see In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 725 F. Supp.

712, 733 (S.D.N.Y. 1989), "the defendant's obligation to the third-party beneficiary need not be explicitly stated in the contract itself." *Cauff, Lippman & Co. v. Apogee Fin. Group, Inc.*, 807 F. Supp. 1007, 1020 (S.D.N.Y. 1992). "Absent such intent, [however,] the third party is merely an incidental beneficiary with no right to enforce the particular contracts." *Port Chester Elec. Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 655, 389 N.Y.S.2d 327, 330, 357 N.E.2d 983 (1976); *see also In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 725 F. Supp. at 733; *Reiner v. West Village Assocs.*, 600 F. Supp. 233, 239 (S.D.N.Y. 1984), aff'd, 768 F.2d 31 (2d Cir. 1985). In other words, MacDraw must show that:

> the promise must [have been] made to [MacDraw] in fact although not in form. It is not enough that the contract may operate to [MacDraw's] benefit. It must appear that the parties intended to recognize [MacDraw] as the primary party in interest and as privy to the promise.

Worldwide Sugar Co. v. Royal Bank of Canada, 609 F. Supp. 19, 25 (S.D.N.Y.).

For example, in *Braten v. Bankers Trust Co.*, 60 N.Y.2d 155, 468 N.Y.S.2d 861, 456 N.E.2d 802 (1983), Braten, third party suppliers of a company which had defaulted on a loan agreement with Bankers Trust Company, sued Bankers Trust, claiming to be intended third party beneficiaries of the loan agreement with the insolvent company. Id., 468 N.Y.S.2d at 863. Deeming Braten merely incidental beneficiaries of the commercial loan, the New York Court of Appeals affirmed dismissal of the third party beneficiary claims, finding:

> although a continuation of the Bank's extension of credit to [Braten] might have benefitted them as suppliers, there is no proof of intent to given them any independent right. They are at best incidental beneficiaries with no action against the Bank for breach of the alleged promise.

Id., 468 N.Y.S.2d at 865.

In the case at hand, none of the loan documents evidence any intent by either CIT or Laribee to confer third party rights upon MacDraw. In fact, explicit language in the Progress Payment Agreement and Vendor's Consent Agreement demonstrate that the parties specifically intended not to confer third party beneficiary status upon anyone. Section 9.10 of the Progress Payment Agreement provides that:

> THIS AGREEMENT SHALL BE BINDING UPON AND INURE TO THE BENEFIT OF [LARIBEE] AND CIT AND THEIR RESPECTIVE SUCCESSORS AND ASSIGNS, EXCEPT THAT [LARIBEE] MAY NOT ASSIGN OR TRANSFER ITS RIGHTS HEREUNDER OR ANY INTEREST HEREIN WITHOUT THE PRIOR WRITTEN CONSENT OF CIT.

As Laribee never requested CIT's permission to "assign or transfer" any of its rights to MacDraw, there is no evidence that CIT's financing of Laribee's purchase of the Equipment was made for MacDraw's benefit. Rather, to the extent that a beneficiary of the loan documents can be identified, that beneficiary was clearly Laribee.

Similarly, the Vendor's Consent Agreement provides that "CIT assumes no obligations . . . it being a successor to [Laribee's] rights but not our obligations." This agreement, by itself, is compelling proof that CIT never intended to be obligated to MacDraw as it assumed none of Laribee's obligations. *See In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 725 F. Supp. at 733 ("If two contracting parties expressly provide that some third party who will be benefitted by performance shall have no legally enforceable right, the courts should effectuate the express intent by denying the third party any direct remedy.") (citing 4 *Corbin on Contracts* § 776 at 7 (Supp. 1971)). Accordingly, the benefit to MacDraw can only be described as incidental.

In addition, even assuming that MacDraw was an intended third party beneficiary, it possessed no greater right to enforce the contract than the actual parties to the contract. *BAII Banking Corp. v. UPG*, Inc., 985 F.2d 685, 697 (2d Cir. 1993). Thus, MacDraw would still have no remedy against CIT because, at most, it would "step into the shoes" of Laribee, the promisee. Id. ("it would be contrary to justice or good sense to hold that [a third-party beneficiary] should acquire a better right against the promisor than the promisee himself had") (citing *Dunning v. Leavitt*, 85 N.Y. 30, 35 (1881)). As Laribee had defaulted under the Progress Payment Agreement, CIT had the right to terminate its financing commitment and cease any further disbursement of funds. Therefore, once Laribee defaulted, neither Laribee nor MacDraw, as a third party beneficiary, could compel payment of the Ten Percent Installment under the Progress Payment Agreement. Accordingly, as MacDraw is not entitled to recover as a third party beneficiary, Count Two of the Complaint is dismissed.

D. The Promissory Estoppel Claim (Third Cause of Action)

MacDraw seeks partial summary judgment on its third cause of action based on the theories of promissory estoppel and quasi-contract.

1. Promissory Estoppel

The elements of a cause of action for promissory estoppel are (1) a clear and unambiguous promise; (2) reasonable reliance by the purported promisee; and (3) injury. *Reprosystem, B.V. v SCM Corp.*, 727 F.2d 257, 264 (2d Cir. 1984); *Margate Indus., Inc. v. Samincorp. Inc.*, 582 F. Supp. at 618. The party asserting estoppel has the burden of proof as to each of these elements in order to state a viable claim. *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 725 F. Supp. at 734. Promissory estoppel is a "narrow doctrine," however, which is designed to enforce a contract where some other contract formation problem, such as the Statute of Frauds, would otherwise prevent enforcement. Id. at 735.

The "clear and unambiguous" promise which MacDraw alleges with respect to its estoppel argument is essentially the same as the misrepresentation asserted in the fraud claim, Count One of the Complaint. Specifically, MacDraw claims that "CIT made repeated promises . . . to the effect that [it] would make payments to MacDraw if MacDraw satisfied certain verification requirements, delivered certain equipment, and completed certain installations in order to make the equipment fully operational." Complaint at P 49. Thereafter, in reliance upon CIT's alleged promise that it would make final payment upon installation, MacDraw claims to have expended

an additional $273,940.12 on "specialized labor and spare parts" to get the Equipment installed and fully operational. Id. at 55.

The Court finds a genuine issue of material fact as to whether a promise was in fact made and whether MacDraw justifiably relied upon that promise. First, with respect to the alleged promise, both of CIT's witnesses, defendant Johnston and James P. Swalwell, categorically deny making such oral representations. *See* Johnston Aff. at PP 7-13; Affidavit of James P. Swalwell, sworn to on April 1, 1992, at PP 7-14. Second, with respect to the issue of reliance, the Court finds that, as discussed previously, a genuine issue of material fact exists as to whether MacDraw relied upon CIT's alleged promise in continuing to install the Equipment. Thus, with respect to the claim for promissory estoppel, the cross-motions for summary judgment are denied.

2. The Claim for Unjust Enrichment

In addition to promissory estoppel, MacDraw has also cast its third cause of action in quasi-contract and unjust enrichment, purportedly on the ground that CIT (1) sold the Equipment and (2) did not share the proceeds of that sale with MacDraw. Alluding to CIT's "over-collateralized" position with respect to the Equipment, MacDraw contends that "injustice would result, and CIT would be unjustly enriched, if CIT's promise to make final payment for ten (10) percent of the value of the equipment were [sic] not enforced." Complaint at P 62.

Plaintiffs seeking to recover under an unjust enrichment theory, "must first show that a benefit was conferred upon the

defendant, and then show that as between the two parties enrichment of the defendant was unjust." *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d at 263; *see also Yankee Publishing Inc. v. News Am. Publishing Inc.*, 809 F. Supp. 267, 282 (S.D.N.Y. 1992) ("plaintiffs must show that the defendant has been enriched at plaintiffs' expense 'under such circumstances that in equity and good conscience he ought not retain.'") (quoting *Miller v. Schloss*, 218 N.Y. 400, 113 N.E. 337 (1916)).

On the record before the Court, MacDraw has not provided sufficient evidence to support its unjust enrichment claim. First, CIT has not been made whole with respect to the Laribee transaction, and like MacDraw, has taken its place among the bankruptcy proceeding's general creditors in order to claim its deficiency. Beroza Aff. at P 64 n.10. In addition, MacDraw received in excess of $ 6.4 million for the Equipment, reflecting ninety percent of its purchase price -- all financed and disbursed by CIT. Thus, the Court finds no evidence that "as between the two parties," CIT's recovery from the sale of the Equipment in any way "unjustly" enriched it at plaintiff's expense.

Second, assuming that CIT's position was "over-collateralized,"[9] MacDraw has not provided any legal

---

[9] Although CIT denies being "over-collateralized," an internal memorandum from Johnston dated December 17, 1990, indicates that "CIT has liens on 100% of the equipment covered by this agreement, and as such we are in an over-collateralized position." *See* Johnston Memorandum, annexed to the Colella Aff. as Exh. "6." Nonetheless, the Court finds that a secured position which exceeds the value of the underlying debt is not unlawful. Indeed, "a creditor may very well possess a [purchase money security interest] in collateral whose value exceeds the amount of the loan

authority which would vest it -- a general, unsecured creditor -- with any rights in the excess proceeds from the sale of the Equipment. Had excess proceeds resulted from that sale, they would have devolved first to any junior secured creditors, and then the Laribee Estate in bankruptcy. *See* N.Y.U.C.C. Law § 9-504 (McKinney 1990); *In re Ionosphere Clubs, Inc.*, 123 Bankr. 166, 172 (S.D.N.Y. 1991) (any surplus from the sale of secured collateral "would be returned to the debtor, to be held for the benefit of all creditors who held non-purchase money security interests"). Accordingly, the Court finds that the equities do not lie in MacDraw's favor, and that CIT need not share the proceeds of the sale with MacDraw. For this reason, the claim for unjust enrichment is dismissed.

E. The Breach of Contract Claim (Fourth and Fifth Causes of Action)

MacDraw's Fourth and Fifth Causes of Action both sound in contract, alleging a binding promise by CIT to pay the Ten Percent Installment of $ 711,862.80 under the original Purchase Agreements. Specifically, plaintiff avers that, in or about November and December 1990, "CIT promised MacDraw that it would make final payment for ten (10) percent of the equipment delivered if MacDraw completed installation and fine tuning of all the equipment delivered to Laribee." Complaint at PP 64, 68. Thereafter, on December 20, 1990,[10] MacDraw completed installation of the

---

made to purchase it." *In re Ionosphere Clubs, Inc.*, 123 Bankr. 166, 172 n. 2 (S.D.N.Y. 1991).

[10] In actuality, MacDraw has propounded a variety of dates representing final installation of the Equipment. *See* Complaint at P 25 (October 22, 1990); Complaint at P 65 (December 20, 1990); Complaint at P 70

Equipment, expending an additional $ 273,940.12 in specialized labor and parts. Id. at P 65. MacDraw alleges that CIT breached its promise to pay the final ten percent of the value of the Equipment. Id. at PP 66, 71. Although the two causes of action are styled as breach of "unilateral contract" (Count Four) and breach of "contract implied in fact" (Count Five), each theory depends upon proof of oral representations allegedly made by CIT. As a result, such promises, to be enforceable, must satisfy New York's Statute of Frauds.

1. Evidence of a Writing or Writings

With respect to promises such as the one at issue here, New York's Statute of Frauds provides that:

> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: .. . (2) is a special promise to answer for the debt, default or miscarriage of another person.[11]

(December 12, 1990); Pls. Reply Mem. at 12 (November 16, 1990).

[11] Although MacDraw contends that the alleged promise is not really one of surety for Laribee's obligations within the scope of New York's Statute of Frauds, but rather, a new "primary" obligation, *see* Pls. Mem. at 14-21, the Second Circuit has previously rejected a similar argument. *See* Hawley Fuel Coalmart, Inc. v. Steag Handel GMBH, 796 F.2d 29, 33 (2d Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987). As the Second Circuit found, the new "obligation" would be unenforceable as there is nothing to suggest that MacDraw discharged Laribee from its original debt. Thus, the contract modification argument fails as a matter of law.

N.Y. Gen. Oblig. Law § 5-701(2) (McKinney 1989). New York law allows the Statute of Frauds to be satisfied by a combination of writings, "provided that they clearly refer to the same subject matter or transaction." *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 55, 110 N.E.2d 551, 554 (1953) (citations omitted). The Second Circuit has imposed two further threshold requirements: (1) "the signed writing must itself establish 'a contractual relationship between the parties;'" and (2) the unsigned writings must "on its face refer to the same transaction as that set forth in the one that was signed." *Horn & Hardart Co. v. Pillsbury Co.*, 888 F.2d 8, 11 (2d Cir. 1989) (quoting *Crabtree v. Elizabeth Arden Sale Corp.*, 305 N.Y. at 56).

Compliance with these two threshold requirements may be decided by the district court as a matter of law, and must be considered without the introduction of parol evidence. "Parol evidence . . . is immaterial to the threshold issue whether the documents are sufficient on their face to satisfy the Statute of Frauds."

Id. at 11 (quoting *Bazak Int'l Corp. v. Mast Indus., Inc.*, 73 N.Y.2d 113, 118, 538 N.Y.S.2d 503, 505, 535 N.E.2d 633 (1989)). Finally, "if the proferred writings permit doubt as to the existence or nature of the contractual relationship, the inquiry is terminated and the agreement deemed unenforceable." Id.

In its attempt to satisfy the Statute of Frauds, MacDraw relies upon seven documents, five of which are signed, namely: (1) the telefacsimile from Johnston to Colella dated October 12, 1990; (2) an October 22, 1990 interoffice memorandum from Jim Waller, vice president of Laribee to

Manuel L. Ramos, executive vice president of Laribee; (3) a November 16, 1990 letter from Manuel L. Ramos to Johnston; (4) the Form Letter, dated November 30, 1990; (4) the Form Letter's telefax transmittal sheet; (5) a December 17, 1990 internal memorandum from Johnston to the files; (6) three "Interim Supplements;" and (7) Laribee's Officer's Certificate. Only four of these documents require extended discussion.[12]

a. The October 12th Telefacsimile

With respect to the telefacsimile written by Johnston on October 12, 1990, which "confirmed" his alleged oral promise of October 11, 1990 whereby CIT "agreed to be directly obligated to pay MacDraw $ 711,862.80," *see* Pls. Mem. at 10, that document states in its entirety:

> In response to your fax of 10/11/90, we will be able to proceed forward with the final funding once we have received confirmation from Laribee that the equipment has been installed and accepted.

---

[12] The October 22nd interoffice memorandum, indicating that "only the final 10% installment is due;" Laribee's Officer's Certificate, referencing the Progress Payment Agreement and indicating that the Equipment was delivered; and the November 16, 1990 letter from Laribee to Johnston, also referencing the loan agreement and indicating that the Equipment was installed and payment authorized were not signed by CIT, the party to be charged, and focus solely on the installation of the Equipment. They do not establish that an independent contract existed between MacDraw and CIT, but rather, are in conformity with, and expressly refer to, the Progress Payment Agreement. Although the Interim Supplements are signed by CIT, these documents also make no reference whatsoever to any separate contract between CIT and MacDraw.

> It will be necessary for Laribee to provide CIT with a letter confirming their final acceptance of the equipment and authorization to fund the final payment to MacDraw.
>
> It is my understanding that the installation of the equipment is being handled by MacDraw engineers/mechanics. As such, it would seem that final acceptance of the equipment is a matter to be resolved between MacDraw and Laribee.

See telefacsimile from Johnston to Colella of October 12, 1990, annexed to the Colella Aff. as Exh. "5" (the "October 12th telefacsimile").

The language of the October 12th telefacsimile precludes a finding that it either (1) constitutes an unequivocal promise by CIT to pay MacDraw $711,862.00 or (2) contains all the material terms to such a promise. First, the telefax indicates that, upon receipt of confirmation of the Equipment's delivery and installation, CIT "will be able to proceed forward with the final funding." The language "will be able to proceed" is hardly sufficient to constitute a binding representation that CIT intended to release the Ten Percent Installment based solely upon MacDraw's completion of the Equipment's installation. Rather, the October 12th telefacsimile implies that, once Laribee provided the necessary authorization, CIT's Credit Department would proceed with the final funding and commence the financial analyses necessary to determine Laribee's compliance with all of the financial covenants under the Progress Payment Agreement.

Moreover, the telefacsimile's second paragraph, indicating that Laribee's authorization was necessary to fund the final payment is at odds with MacDraw's contention that CIT had orally promised that, notwithstanding any other conditions of the Progress Payment Agreement, CIT would release the Ten Percent Installment solely upon evidence of Equipment installation. In fact, nowhere does the telefacsimile indicate a new and independent promise by CIT, separate and distinct from the Progress Payment Agreement or Vendor's Consent Agreement, whereby over $ 900,000.00 would be disbursed directly to MacDraw.

Second, the October 12th telefacsimile lacks various essential terms including: (1) the specific amount of the final payment; (2) the date when payment would be made; (3) any reference to the Enhancements; or (4) the fact that the Progress Payment Agreement was no longer in effect, and that CIT had entered into a separate agreement with MacDraw whereby final payment was solely contingent upon completed installation. Indeed, as the October 12th telefacsimile evidences no agreement by CIT to answer for Laribee's debt, it does not satisfy the Second Circuit's threshold requirement that "the signed writing must itself establish 'a contractual relationship between the parties.'" *Horn & Hardart Co. v. Pillsbury Co.*, 888 F.2d at 11 (quoting *Crabtree v. Elizabeth Arden Sale Corp.*, 305 N.Y. at 56).

b. The Form Letter and Telefacsimile Cover Sheet

On November 30, 1990, before CIT completed its due diligence investigation, Johnston telefaxed to Colella a standard form letter on which Laribee was to indicate where to direct the proceeds when ready. *See* telefacsimile annexed

to the Colella Aff. as Exh. "7." On the Form Letter, Johnston marked in the scheduled amount of the Ten Percent Installment, together with MacDraw's depository bank and account number. Additionally, on the transmittal sheet accompanying the Form Letter, Johnston requested that Colella "verify [the Form Letter's] accuracy." Id. Although MacDraw contends that this routine verification constituted a promise by CIT that payment of the Ten Percent Installment was imminent, *see* Colella Aff. at P 13, the Form Letter and telefax transmittal sheet are nothing more than wire transfer instructions, sent in anticipation of disbursement of the Ten Percent Installment once CIT determined that the final payment could be released. In fact, although the Form Letter supplies the amount of the Ten Percent Installment, it contains no promise that CIT would make payment to MacDraw upon installation. The letter only anticipates that the Equipment would be installed, and that Laribee would then direct and authorize CIT to make payment after that. Moreover, the Form Letter is not signed and appears to be just a draft. These writings do not, therefore, provide any evidence that CIT "guaranteed" to pay MacDraw.

c. The December 17th Internal Memorandum

On December 17, 1990, Johnston drafted an internal memorandum regarding the Laribee Wire Loan consolidation, to explain to CIT's servicing department why CIT had only loaned Laribee ninety percent of the Equipment loan value. *See* Memorandum, annexed to the Colella Aff. as Exh. "6" (the "December 17th Memorandum"). In the course of making that explanation, Johnston wrote that "the unfunded 10% portion represents the amount to be paid the vendor upon satisfactory installation of the equipment." Id. Although

MacDraw contends that this clause constitutes further confirmation that CIT promised to pay the Ten Percent Installment, *see* Colella Aff. at P 12, in fact, the December 17 Memorandum to CIT's servicing department was merely an explanation, after the decision not to fund the Ten Percent Installment already had been made, of the discrepancy between the Progress Payment Agreement's original evaluation of the Equipment ($ 7,118,628.00) and the fact that CIT had only lent Laribee ninety percent of that amount ($ 6,406,765.00). The December 17th Memorandum does not clearly establish that a contract existed between CIT and MacDraw, such that CIT would pay MacDraw regardless of the terms of the Progress Payment Agreement. Moreover, by the time that the December 17th Memorandum was drafted, MacDraw knew that Laribee was not in compliance with the Progress Payment Agreement, and that CIT would not be releasing the funds upon installation. *See* telefacsimile from Colella to Muschlitz, of November 28, 1990, annexed to the Beroza Aff. as Exh. "K." Accordingly, this document also does not satisfy the Second Circuit's threshold requirement that one signed writing establish the parties' contractual relationship.

2. The *Martin Roofing* Exception

In the seminal case of *Martin Roofing, Inc. v. Goldstein*, 60 N.Y.2d 262, 469 N.Y.S.2d 595, 457 N.E.2d 700 (1983), *cert. denied*, 466 U.S. 905 (1984), the New York Court of Appeals articulated a two-prong standard under which a party may enforce an oral promise to answer for the debt of another "outside" the Statute of Frauds. Under that standard, an oral promise may still be enforced if (1) "it is supported by a new consideration moving to the [alleged] promisor and beneficial

to him," and (2) the parties intend that the alleged promisor "comes under a duty to pay irrespective of the liability of the original debtor." Id., 60 N.Y.2d at 265, 267. As the test is conjunctive, both parts must be satisfied in order to enforce a promise outside the Statute of Frauds. Id., 60 N.Y.2d at 267. Without addressing whether MacDraw can satisfy the first prong of *Martin Roofing's* dual standard, the Court finds that MacDraw has not demonstrated that "the original debtor's obligation [was] excused." *Posner v. Minnesota Mining & Manufacturing Co.*, 713 F. Supp. 562, 564 (E.D.N.Y. 1989) (citing *Hawley Fuel Coalmart, Inc. v. Steag Handel GMBH*, 796 F.2d 29 (2d Cir. 1986)). Under the second prong of the *Martin Roofing* standard, MacDraw must demonstrate that it had discharged Laribee's debt on the Purchase Agreements, thereby rendering CIT "primarily liable." The evidence indicates, however, that MacDraw never discharged Laribee from responsibility for the Ten Percent Installment, or for the cost of the Enhancements. To the contrary, MacDraw wrote to Laribee no fewer than four times between October 15, 1990 and January 23, 1991, demanding payment. *See* Various Telefaxes, dated 10/15/90, 12/20/90, 1/17/91, 1/23/91 from MacDraw to Laribee, annexed to the Beroza Aff. as Exh. "G." MacDraw has also filed three Proofs of Claim against the Laribee bankruptcy. *See* Proofs of Claim, annexed to the Beroza Aff. as Exh. "E." Moreover, the Vendor's Consent Agreement expressly provides that "[Laribee] shall in all events remain obligated to [MacDraw] under the [purchase orders]," and that CIT "assumes no obligations."

In similar circumstances, other courts have dismissed the complaint where the parties did not intend to release the original promisor of its obligation. *See Capital Knitting Mills Inc. v. Duofold, Inc.*, 131 A.D.2d 87, 519 N.Y.S.2d 968, 971

(1st Dep't 1987) (where plaintiff invoiced the original promisor and did not look to the defendant for payment until after the promisor's unpaid obligations had mounted, the parties did not intend that defendant was a principal debtor primarily liable); *Hawley Fuel Coalmart, Inc. v. Steag Handel GMBH*, 796 F.2d at 33 (filing of a proof of claim against the original promisor belies discharge for purposes of the Statute of Frauds); *Karl Ehmer Forest Hills Corp. v. Gonzalez*, 159 A.D.2d 613, 553 N.Y.S.2d 22, 23 (2d Dep't 1990) (the original promisor was "not relieved of its obligation by virtue of the individual defendant's subsequent promise"). Thus, as MacDraw has continued to look to Laribee for payment after the alleged oral promise by CIT, the *Martin Roofing* exception is not applicable. Accordingly, defendants' motion for summary judgment with respect to Counts Four and Five of the Complaint is granted, and those claims are dismissed.

III. DEFENDANTS' MOTION FOR SANCTIONS

Defendants move for sanctions, pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927, arguing, among other things, that (1) MacDraw has no basis whatsoever to seek the costs of the Enhancements; (2) MacDraw's motion for partial summary judgment depends in large part upon oral representations which were already denied in defendants' answer; and (3) MacDraw had brought a previous motion to amend the Complaint which was also without merit. The Court agrees that sanctions should be imposed in this instance.

The purpose of Rule 11 is to streamline the litigation in the federal courts by thwarting the use of frivolous and abusive trial tactics. *McMahon v. Shearson/American Express, Inc.*,

896 F.2d 17, 21-22 (2d Cir. 1990). The Second Circuit has held that:

> Sanctions shall be imposed against an attorney and/or his client when it appears that a pleading has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243, 254 (2d Cir. 1985).

Similarly, section 1927 of the United States Code provides that:

> An attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. There need be no showing of bad faith on the part of the signer of the submission at issue for sanctions to be imposed. *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 504 (2d Cir. 1989). Rather, "where a claim is clearly 'destined to fail based on the facts and existing precedent, and where no reasonable argument could be advanced to change or extend the present rule, rule 11 requires a sanction.'" *West Indian Sea Island Cotton Ass'n v. Threadtex*, 761 F. Supp. at 1055 (quoting *O'Malley v. New*

York City Transit Auth., 896 F.2d 704, 706 (2d Cir. 1990)). Thus, the Court is empowered to hold an attorney who 'multiplies the proceedings in any case unreasonably and vexatiously' personally liable for excess costs, expenses, and attorneys' fees incurred as a result of his or her improper conduct." *Mone v. Commissioner*, 774 F.2d 570, 574 (2d Cir. 1985) (quoting 28 U.S.C. § 1927).

In the case at hand, the Court finds that sanctions are warranted. First, and most importantly, MacDraw had no cognizable basis to make its motion for partial summary judgment with respect to Counts Three, Four and Five of the Complaint. The crucial issue with respect to each of these counts, alleging promissory estoppel and breach of contract, are a series of alleged oral communications between Colella and Johnston. In its answer, however, CIT denied that such oral representations were made. Thus, before MacDraw's motion was even brought, an issue of fact existed as to whether Johnston had orally promised anything. As a result, MacDraw could not possibly have obtained summary judgment on any purported oral promise theory.

Moreover, the Court is deeply troubled by MacDraw's claims regarding entitlement to (1) the $270,523.00 in Enhancements; and (2) work that was performed before the October 11th Promise or after the November 28th notification that CIT would not be releasing the Ten Percent Installment until Laribee complied with CIT's requests. Colella's own deposition testimony indicates that not only were such Enhancements financed through a different company, but that CIT had never requested or agreed to pay for them. Similarly, MacDraw's claim that it detrimentally relied upon CIT's October 11th Promise in shipping the Equipment, two months

before this representation was made, is clearly without merit. It is apparent that "plaintiff's counsel engaged in little or no preliminary factual and legal investigation," before bringing its motion, *see Wrenn v. New York City Health & Hospitals Corp.*, 104 F.R.D. 553, 559 (S.D.N.Y. 1985). Thus, Rule 11 sanctions are appropriate here. Accordingly, defendants are directed to submit an affidavit setting forth their legal fees and costs in defending plaintiff's motion for summary judgment.

IV. MOTION FOR VOLUNTARY RECUSAL

As a final matter, MacDraw has requested leave to file a motion for voluntary recusal, pursuant to 28 U.S.C. § 455(a), on the grounds that the Court "has prejudged the case against the plaintiff." *See* Letter to the Honorable Shirley Wohl Kram from Larry Klayman of 5/14/92. The Court reminds the parties that it has the power to impose sanctions and award attorneys' fees sua sponte or on motion where the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *F.D. Rich Co. v. United States*, 417 U.S. 116, 129, 40 L. Ed. 2d 703, 94 S. Ct. 2157 (1974). With this warning in mind, the parties are directed to jointly prepare and submit to the Court by February 18, 1994, a proposed schedule for submission of the motion.

CONCLUSION

For the reasons set forth above, MacDraw's request for permission to make a motion for voluntary recusal, pursuant to 28 U.S.C. § 455(a), is granted. MacDraw's motion for (1) a jury trial and (2) partial summary judgment on Counts Two, Three, Four and Five of the Complaint, and CIT's motion for summary judgment with respect to Counts One and Three of

the Complaint, are denied. CIT's remaining motions for (1) dismissal of Counts Two, Four and Five of the Complaint, pursuant to Rule 56 of the Federal Rules of Civil Procedure and (2) sanctions, pursuant to Rule 11 and 28 U.S.C. § 1927, are granted. The parties are directed to jointly prepare and submit to the Court by February 18, 1994, a proposed schedule for submission of the motion for voluntary recusal. CIT is further directed to submit an affidavit setting forth its costs and legal fees associated with defending MacDraw's motion for partial summary judgment. Finally, the parties are directed to proceed with any remaining discovery, and promptly notify the Court of any discovery problems.

SO ORDERED.

/s/
SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
January 17, 1994